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*THE MUSLIM WIVES' SHARE IN MATRIMONIAL WEALTH: BETWEEN THEORY AND  
PRACTICE*

MA Thesis

*Under the Supervision of Dr. Mohamed Serag*

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## Introduction:

According to ‘urf in most Muslim countries, there is gender division of household labor, according to which the wife is responsible for the household chores, and men provide household’s maintenance.<sup>1</sup> However, personal status laws do not correspond to the same splitting concept at the time of divorce with regard to the matrimonial wealth.<sup>2</sup> When marriage ends, the husband is entitled to all the matrimonial wealth accumulated during the course of marriage without sharing it with the spouse and financially he is only requested to pay the delayed dowry alimony and *mut’a*.<sup>3</sup> Nevertheless, the amount of labor and time the woman provides to promote the family status goes unevaluated and financially uncompensated, which is contradictory to verse 32 in *surat al-Nisaa*.<sup>4</sup> This paper attempts to evaluate the importance of women’s labor in the household being monetized into a share in the matrimonial wealth through the financial right termed the right of *al-Kadd wa al-Se’aya*. Furthermore, this paper intends to draw the attention of both Egyptian society and legal profession to the financial right of *al-Kadd wa al-Se’aya*, entitled to Egyptian wives and argues for the importance of incorporating this financial right in Egyptian personal status law in order to remove financial injustice borne on Egyptian women in the course of marriage. If Egyptian women were entitled to their right of *al-Kadd wa al-Se’aya*, some women might be

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<sup>1</sup> ‘urf: local customs

Source: Sonbol, Amira E. A. *Women of Jordan: Islam, Labor, and the Law*. Syracuse University Press, Syracuse, NY, 2003, p. 157

<sup>2</sup> *ibid*, p. 159

<sup>3</sup> Matrimonial Wealth: property or wealth acquired by a spouse during the course of marriage, excluding inheritance or gifts.

*Muta’*: financial compensation for separation

source: *ibid*, p.159

<sup>4</sup> Please refer to chapter one.

Verse 32 in *surat al-Nisaa* states, “And do not wish for that by which Allah has made some of you exceed others. For men is a share of what they have earned, and for women is a share of what they have earned. And ask Allah of his bounty. Indeed Allah is ever, of all things, knowing”.

Source: <https://quran.com>, accessed 15<sup>th</sup> of March 2018

encouraged to not remain in unsatisfactory marriages out of fear of not being able to sustain themselves financially. Also, Egyptian women might possibly come to feel that they are on the same footing as their husbands in the marriage institution, as the latter could begin acknowledging that women's effort could now be monetized. Egyptian women could also begin to have a say in the management of the matrimonial wealth, since they will be seen as legitimate economic partners.

The classical Islamic jurist perspective of the marriage contract is that it refers to "*husband's exclusive right to sexual enjoyment of his wife*".<sup>5</sup> According to this definition women are expected only to fulfill sexual gratification, however in reality the role of women in the marital institution surpasses this requirement. Thus, women exert labor that is not required from them from an Islamic jurisprudence perspective due to the '*urf*' that shaped their role in such manner.<sup>6</sup> For example, in rural areas, women are expected to take care of the children, assist in harvesting crops, tend to cattle and perform other household chores. In urban areas, women are expected to take care of children, assist them with studies and go to doctor's appointments and sports classes all in addition to household chores.

Today both spouses contribute equally to the financial wellbeing of the household, and take decisions jointly regarding different family affairs.<sup>7</sup> Although in accordance with the *Shari'a*, husbands are responsible for maintaining their wives in the form of "*food, clothing, housing, medical needs within the known bounds, and a servant to serve the wife whose social equals have servants*", Muslim wives are not expected to contribute financially to the maintenance of the household, according to the *shari'a*.<sup>8</sup> Thus further pressure is put on working wives who are according to '*urf*', since they are expected to

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<sup>5</sup>El Alami, Dawoud S. *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco*. Graham & Trotman, Boston; London; 1992, p. 10

<sup>6</sup> Please refer to chapter two.

<sup>7</sup>Sonbol, Amira E. A. *Women of Jordan: Islam, Labor, and the Law*. Syracuse University Press, Syracuse, NY, 2003, p. 154

<sup>8</sup>*ibid.*, p. 151

uninterruptedly tend to household demands, while performing their job requirements.<sup>9</sup> There are different scenarios in which women labor which include performing household labor, work in labor market and the household, work in the husband's property (land), or partner with their husbands, mostly associated with crafts labor (for example in a weaving business the husband sews and the wife weaves).<sup>10</sup> In addition, women may be the breadwinner of the family, which is a popular scenario in the modern Egyptian society.

In analyzing women's labor in the household in the scenarios mentioned earlier, from an Islamic jurisprudential perspective, it is important to note that the four schools of jurisprudence share the conclusion that women are not obligated to perform the household chores.<sup>11</sup> Moreover, Al Tahawi (d. 933) added that a husband is obligated to provide a servant for the wife, if she asked for it.<sup>12</sup> Additionally, al-Imam al-Rahouni (d. 1815) confirmed in his *Hasheya* (explanation) of Imam Maliki's school of jurisprudence; that women are not obligated to do household chores.<sup>13</sup> According to Abu Zahra "a marriage contract is for companionship, not for sex. Thus, it does not entail doing household chores".<sup>14</sup> Some of the advocacy for sharing the matrimonial wealth between spouses base their argument on the *ijama'* (consensus) of the four schools of jurisprudence that wives are not requested to

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<sup>9</sup> Sonbol, Amira E. A. *Women of Jordan: Islam, Labor, and the Law*. Syracuse University Press, Syracuse, NY, 2003, p.159

<sup>10</sup> Please refer to chapter 2 for more details.

<sup>11</sup> Ibn 'Abd al-Salam. A. 2010. *Mina al-Huquq al-Maliyya li al-Mar'a*. 2<sup>nd</sup> ed. Al-Ribat: Dar al-Qalam, p.117

<sup>12</sup> Ibid

<sup>13</sup> Al-Zarkani, Muhamed a. (2001). *Hasheyat Al-rahouni Ala Sharh Al-zarkani*, Dar Al-fikr Al-islami Al-hadith Ahmed Ibn Muhammed al-Rahouni. Born in 1871. Died in 1953. Historian. Appointed Head of Higher Council of Islamic Education in Tatwan.

Source: Yūsuf, Muḥammad K. R., and Khayr a. Ziriklī. *Tatimmat Al-Alām Lil-Ziriklī: Wafayāt 1397-1415 H/1977-1995 M*. Dār Ibn Ḥazm, Bayrūt, Lubnān, 1998, volume 1, p. 253

Source: <http://islamport.com>, accessed 30<sup>th</sup> of December, 2017.

<sup>14</sup> Ibn 'Abd al-Salam. A. 2010. *Mina al-Huquq al-Maliyya li al-Mar'a*. 2<sup>nd</sup> ed. Al-Ribat: Dar al-Qalam, p.117

contribute in the maintenance of the household, neither are they obligated to do household labor. Thus, there is a need for a financial compensation for the “*extra*” effort exerted.<sup>15</sup>

However, when the marriage ends, the law does not protect the wife’s financial rights in the matrimonial wealth she and her husband developed together.<sup>16</sup> Women are not treated as equal partners in the institution of marriage, and they are hence deprived of their entitlement to the proceedings of their labor. Below are three merely illustrative real life cases which show that not monetizing women’s labor in the household adversely affected Egyptian women’s economic wellbeing, and hence the need for the right of *al-Kadd wa al-Se’aya*.

Case # 1: H.T. has been married for 36 years to A.S. She is an Egyptian middle income university graduate employee in a governmental institution. Her monthly salary is 2000 EGP. Her husband works 7 days a week, from 9 am till 2 am. Thus, she was requested to do all household labor, go to all doctors’ appointments, all of the children’s activities, drop off and pick up their children from school, and goes to all family commitments alone. She discovered that her husband is having an affair. She could not ask for a divorce, because she will not be able to sustain herself with her monthly salary.<sup>17</sup>

Case # 2: N.M is an Egyptian middle aged lower income female married to a laborer whose income is seasonal and it is estimated to be 400 EGP per month, according to her. She works as a household servant. She has a steady monthly income of 2000 EGP. Because of her income, she was able to buy air conditioners, and send her children to school and now to public college. She paid the installments of mortgage loan of the apartment, now owned by her husband. According to N.M, it is more socially acceptable for the husband to be the legal owner of the property, as in lower social classes, it is offensive to the husband to be living in

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<sup>15</sup>Mir-Hosseini, Ziba, et al. *Gender and Equality in Muslim Personal status law: Justice and Ethics in the Islamic Legal Tradition*. I.B.Tauris, New York;London, 2013. P. 98

<sup>16</sup> *ibid*.

<sup>17</sup>A case encountered by the Author.

his wife's property. After 24 years of marriage, she caught her husband cheating on her. She cannot ask for a divorce, because the apartment is owned legally by her husband, so in case of divorce, he would be able to require her to leave the apartment. And since her husband does not have a steady income, the court would not require him to pay maintenance to her.<sup>18</sup>

Case # 3: A rural Egyptian woman got married to a farmer who owned one acre of land. She helped in harvesting the land, tending to cattle, taking care of the children, and doing the household labor. Her husband benefitted from the sales of the cattle offspring and the harvest, because in rural areas it is more socially acceptable for the man to be the sole agent of the money. He was able to buy more land, because the matrimonial wealth was developed. He was able to purchase 8 acres of land. After 25 years of marriage, he decided to marry another younger girl. The first wife wanted a divorce and asked for her share in the seven acres of land which the husband was able to acquire only because of her labor pre mentioned.<sup>19</sup>

These cases can illustrate the economic injustice borne on Egyptian women in the marital institution. In Egypt, just as with other Islamic countries, the increase in the cost of living is forcing some women to enter the labor market and provide for the household in the same manner as does the husband.<sup>20</sup> Finally, if a married couple decides to get divorced, a woman is entitled to *nafaqa* (maintenance) and *muta'a* (compensation for separation), however foregoing compensating her financially for the labor she exerted in the development of the matrimonial wealth.

It is important here to distinguish between monetizing women's labor in the household per se and monetizing the women's role in the household as wives and mothers.

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<sup>18</sup>A case encountered by Dr. Mohamed Serag

<sup>19</sup>A case encountered by Dr. Mohamed Serag

<sup>20</sup>Markaz al-Dawlī al-Islāmī lil-Dirāsāt wa-al-Buḥūth al-Sukkānīyah. *The Position of Woman in Islamic Family: Paper Presented to the International Islamic Centre for Population Studies and Research, Al-Azhar University, Cairo, 20-22 December, 1975, p.3*



The latter entails regarding women as real economic and psychological partners in the institution of marriage. As will be illustrated in chapter one and two, wife's labor is broader in scope and more fundamental in the wellbeing of the family, than that of hired equals. Hired equals here refers to those who provide the same economic activities, similarly performed by some wives and mothers, such as household servant, cook, or tutor. It is fundamental to point out here that the key difference between a hired individual and a wife or a mother is that the latter does what is in the best interest of the family and household, with no fixed working hours or days off. Also, the psychological role she plays as a wife and a mother is different from that done by the hired equals. This difference was recognized in the pre modern *shari'a* courts, when judges allocated a share of the matrimonial wealth to the wives because they provided "companionship" and "peace of mind" to the husbands, a gap cannot be filled by the hired equals.<sup>21</sup> Thus thesis calls for a share in the matrimonial wealth to be allocated to the wife, and not just compensate financially in the same manner as financially compensating the labor of a hired or paid individual in the household.

In order to study the right of *al-Kadd wa al-Se'aya*, it is essential to understand its linguistic meaning. The word *Kadd* has the same root as its verb *Kadd*. It refers to working hard or exerting physical effort or toil. The word *Se'aya* has the root *sa'a*, which means sponsorship, refers to the entitlement of the financial growth caused by the wife's financial contribution to the household. Thus, the right of *al- Kadd wa al-Se'aya* is "*the right that enables the wife to have a share in the matrimonial wealth because she contributed in its existence or its development via her labor. This right is entitled to women in case of divorce or death of the husband*".<sup>22</sup> Other definitions for the right of *al-Kadd wa al-Se'aya* are that it is "*the right of the wife in the matrimonial wealth that the spouse composes and develops*

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<sup>21</sup> Please refer to chapter 2 and 3

during the course of the marriage”.<sup>23</sup> Another definition is “the right that covers all financial rights of the woman in the financial profit that develops because of her labor and that gets mixed up spontaneously in the husband’s financial assets during the course of their marriage, which entitles her to a share of that financial profit, when marriage ends”.<sup>24</sup> All those definitions are coiled around women’s rights of ownership of the development of the matrimonial wealth in respect to the labor she exerted in the development of the wellbeing of the household and the family.

The thesis builds on four bodies of literature related to the right of *al-Kadd wa al-Se’aya*. The first body is related to the origin of the right of *al-Kadd wa al-Se’aya* in the Qur’anic text. Primary and secondary sources of interpretations of Verse 32 in *Surat al-Nisaa’* are used in a manner that can build upon the legitimacy of the right of *al-Kadd wa al-Se’aya* derived from an interpretation of this verse. This verse is a key element in grounding the legitimacy of the right of *al-Kadd wa al-Se’aya*, because it acknowledges that any labor exerted should be financially compensated. References to the exegesis of al-Tabari (d. 923), Ibn Kathir (d. 1373) Muhammed Abduh (d. 1905), Sayed Qutub (d. 1966) and, Muhammed Ibn ‘Ashur (d. 1973) are illustrated and analyzed. In addition, the thesis will attempt to link between the pre mentioned interpretation of verse 32 in *surat al-Nisaa’* and theories related to the value of labor as a key element in acquiring wealth in an attempt to highlight the importance of financially evaluating and compensating labor. For example, the literature of Ibn Khaldun, John Locke, Karl Marx and Adam Smith which deals with the importance of labor will be utilized, with special focus on Marxist Feminism literature mainly from Christine Delphy who in *Close to Home* refers to the influence of patriarchal societies on denying women their shares of inheritance and thus access to accumulate wealth. In addition, reference to Uris

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<sup>23</sup>Al-Mazkaldi, Omar, 2005. *Haq al-Kadd wa-al-Se’aya: Muhawalah fi al-Ta’sil*. Master Thesis. Muhamed al-Khamis, p. 21

<sup>24</sup>ibid,

Marion Young who believes that labor should be the determining factor in classifying the societal classes will be utilized.

Unfortunately, there are few accessible sources which discuss the right of *al-Kadd wa al-Se'aya* from an Islamic jurisprudence perspective (the second set of literature) and they are mainly located in Morocco. The books are "*Mina al-Huquq al-Maliyah lel Mar'a*" (two volumes) by al-Milki al-Hussein ibn Abdel-Salam and "*Haq al-Zawgah fi al-Kadd wa al-Se'aya: Dirasah fi al-Turath al-Fiqhi al-Maliki*" by Mailud Ka'was. Those two authors advocate for the right of *al-Kadd wa al-Se'aya* in Moroccan family law. Ibn Abdel-Salam provides in his book copies of the early court records that included the right of *al-Kadd wa al-Se'aya*. Those were very beneficial to the present study attempting to argue that the right of *al-Kadd wa al-Se'aya* is not a novel right. The chapter will attempt to illustrate, that the pre modern Muslim scholars were able to monetize woman's labor in the household by allocating her a share of the matrimonial wealth. For example, as some Muslim judges in Fez ruled in several *shari'a* court cases in the 18<sup>th</sup> century that women are entitled to a share in the matrimonial wealth. The thesis therefore will refer to the Islamic scholarly debate with respect to the right of *al-Kadd wa al-Se'aya*, and will investigate the soundness of this right from the Islamic Jurisprudential perspective, to be referred to by legal profession in drafting a legal code to be incorporated in the Egyptian personal status law which entitles Egyptian women for their share in the matrimonial wealth. Among those who argue against the right of *al-Kadd wa al-Se'aya* are Muhammed al-Tawil (d. 1934) in his "*Ishkaleyat al-Amwal al-Muktasabah Mudat al-Zawgeyah*", and Omar al-Mazkaldy in his "*Haq al-Kadd wa al-Se'aya: Muhawalah fi al-Ta'sil*". Their point of views will be illustrated and analyzed in chapter two. In addition, the thesis also made reference to *Shajarat al-Nur al-Zakiyah fi Tabaqat al-Maliyah* to extract the biographies of the Maliki scholars who advocated the right of *al-Kadd wa al-Se'aya*. The pre modern Islamic Qadi/jurist, who allocated a specific

share of the matrimonial wealth to the wife is Ahmed ibn ‘Ardun from Fez will be highlighted in chapter two. However, there are very few sources about his biography and publications such as, “*Ibn ‘Ardun al-Kabir*” by Omar al-Gaidy, that will be referred to in discussing ibn ‘Ardun’s education, social context and his fatwa regarding the division of the matrimonial wealth. Unfortunately, attempts to find the ibn ‘Ardun’s actual fatwa’s discourse were not successful, which further added to the limitations of the study. However, some secondary sources were attainable that included commentaries by Abu Zayed al-Fasi’s on Ibn ‘Ardun’s fatwa.

The third set of literature deals with case studies of Muslim countries that adopted the right of *al-Kadd wa al-Se’aya* in contemporary legal setting. As far as Morocco is concerned, the thesis mainly referred to Katie Zoglin and Leon Buskens illustration of the historical advancement in the Moroccan family law that led to the adoption of the right of *al-Kadd wa al-Se’aya* in the *Mudawanna*. Moroccan court records were based on Abdel-Salam’s book, volume 1, *Mina al-Huquq al-Maleyah lel Mar’a* (previously mentioned). Mark Cammack in his *Marital Property in California and Indonesia: Community Property and Harta Bersama* and R. Michael Feener in *Joint Marital Property in Indonesian Customary, Islamic and National Law* were the main texts used to examine the amendments in the Indonesian family law and how the country translated the concept of *Gono Gini* into its family law.<sup>25</sup> Also, Indonesian court records were extracted from the latter resource. Literature about Malaysian family law is mainly that of Zeinah Anwar and Jane Rumminger journal article called *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, and Rita Reddy in her *Marriage and Divorce Regulation and Recognition in Malaysia*, as well as the *Musuwah* Islamic Feminist NGO’s article titled *Spotlight: Malaysia Muslim Women Rights*. This literature discusses the development of the

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<sup>25</sup> Harta Bersama or Gono Gini: The Indonesian concept that entails that property produced during the marriage is jointly owned by the spouses.

Malaysian family laws and how the concept of *Harta Sepencarian* was translated into a law.

<sup>26</sup> Malaysia court records discussing the right of *al-Kadd wa al-Se'ayawere* extracted from Donald's Horowitz; *The Quran and the Common Law: Islamic Law Reform and the Theory of Legal Change*. A difficulty in trying to access more Malaysian and Indonesian court records was present because court records are available in their native language and neither in Arabic nor English. Therefore, a few cases were referred to from secondary sources as will be later shown.

The fourth set of literature deals with the relation between Islamic jurisprudence and Egyptian personal status laws and gender laws. The sources consulted here are by Lama Abu-Odeh in her book *Modernizing Muslim Family Law: The Case of Egypt* and Jasmine Moussa in her book *Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Shari'a Derived Legislation*. Attempts to find literature on the application of the right of *al-Kadd wa al-Se'aya* in Egypt were unsuccessful. To fill this gap, a set of interviews with Azhari scholars, Gender Studies Academics, and Legal Personnel and Feminists Activists were conducted. Chapter four attempts to investigate the applicability of having the right of *al-Kadd wa al-Se'aya* adopted in the Egyptian personal status law.

The thesis is composed of four chapters, each dedicated to an in depth investigation of the right of *al-Kadd wa al-Se'aya* from different perspectives. In chapter one, evidence for the legitimacy of the right of *al-Kadd wa al-Se'aya* will be illustrated from the Qur'anic text. The main argument of chapter one is that the Qur'anic text clearly states that anyone is entitled to reap the outcome of his/her effort and second this argument by utilizing classical labor theories previously mentioned. Chapter two will attempt to illustrate how some pre modern

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<sup>26</sup> Harta Sepencarian: the Malaysian concept that entails that property produced during the marriage is jointly owned by the spouses.

Muslim scholars were debated the right of *al-Kadd wa al-Se'aya*, with special attention to pre modern Muslim jurist Ahmed ibn 'Ardun, who specified the right of *al-Kadd wa al-Se'aya* to be half the matrimonial wealth. *Shari'a* court records from Morocco that include the right of *al-kadd wa al-Se'aya* will also be examined, as evidence that it was acknowledged in pre modern Maliki courts. This will be followed by a section that will further investigate the Islamic jurisprudence soundness of the right of *al-Kadd wa al-Se'aya*. In chapter three, three Muslim countries, which adopt the right of *al-Kadd wa al-Se'aya* in their legal systems will be examined. Those countries follow different Islamic schools of jurisprudence, yet they were all able to incorporate the right of *al-Kadd wa al-Se'aya* in their personal status law. Finally, Chapter four aims at examining the applicability of the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law by summarizing key arguments pointed out by selected interviewees from different backgrounds. This chapter will attempt to highlight some challenges that might be met in calling for the right of *al-kadd wa al-Se'aya* to be adopted into the Egyptian personal status law.

In conclusion, women's labor that contributed to the development of the matrimonial wealth is ought to be acknowledged and monetized as indicated in verse 32 in *surat al-Nisaa'* via the financial right of *al-Kadd wa al-Se'aya*. The present study attempts to prove that Qur'anic text and Islamic jurisprudence acknowledge that women's labor should be financially compensated as in accordance with the Labor theory of value, which states that labor is the main factor of producing all goods and services, to the extent that prices of commodities are based on the amount of labor exerted to produce them. Therefore, the thesis attempts to uncover that the right of *al-Kadd wa al-Se'aya* is rooted in the Qur'anic text and is in accordance with Islamic jurisprudence, and needs to be translated into a law in Egyptian personal status law to potentially alleviate some financial injustice borne on Egyptian wives in marriage. In addition, the financial right of *al-Kadd wa al-Se'aya* might monetize informal

economic activities performed by the Egyptian women which have their positive impact on the Egyptian economy yet they are not valued which signals economic inefficiency.

## Chapter One:

### The Qur'anic Basis of the Right of *al-Kadd wa al-Se'aya*

#### Verse 32 *Surat al-Nisaa'*

This chapter aims to relate between women labor in the household, its effect on the development of the matrimonial wealth, and their right of owning a share in the matrimonial wealth, based on verse 32 in *surat al-Nisaa'*. Interpretations of verse 32 in *surat al-Nisaa'* that accentuates the view that labor should be monetized and compensated will be illustrated in an attempt to demonstrate the basis of the right of *al-Kadd wa al-Se'aya* in the Qur'anic text. Furthermore, this chapter attempts to analyze the relationship between labor and ownership, with reference to Ibn Khaldun (d. 1406), John Locke (d. 1704), Adam Smith (d. 1790) and Karl Marx (d. 1883) economic theories in an attempt to relate their outcomes with the interpretations of verse 32 in *surat al-Nisaa'*.

#### Verse 32 in *Surat al-Nisaa'*

The legitimacy of the right of *al-Kadd wa al-Se'aya* in the Quran is derived from verse 32 in *surat al-Nisaa'*. According to this verse, if one provides labor then one should be financially rewarded in relation to one's labor.

The verse reads as follows:

*“And do not wish for that by which Allah has made some of you exceed others. For men is a share of what they have earned, and for women is a share of what they have earned. And ask Allah of his bounty. Indeed, Allah is ever, of all things, knowing”.<sup>27</sup>*

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<sup>27</sup><https://quran.com>, accessed on January 4<sup>th</sup>, 2018



First, it is important to understand the linguistic interpretation of the verse by al-Tabari (d. 923). Al-Tabari in his *Jāmi Al-bayān ‘an tawīl Al-Qurān* stated that *iktasab* (earned) refers to exerting physical labor which indicates, according to al-Tabari, that this verse does not refer to inheritance, because it entails exerting physical effort to gain income which is not the case in inheritance. <sup>28</sup>Al-Tabari added that “ask Allah for his bounty” means to ask God for assistance in finding jobs and being able to fulfill the jobs’ requirements in order to gain income from those jobs. Furthermore, he states that “Allah is ever, of all things knowing” means that God will provide his worshippers with the most suitable jobs or sources of income, as He sees fit in regards to their financial needs and capabilities. <sup>29</sup>

Other interpretations of the verse that are not widely referred to are those which link the verse to the importance of monetizing labor as this of Ibn Hazm (d. 1064) who also believes that the verse indicates that economic gains should be in accordance with the amount of labor exerted. <sup>30</sup>Additionally, al-Tusi (d. 1067) in his *al-Tibayan al-Game’ li ‘Uloum al-Quran* stated that the verse either refers to the afterlife rewards or the worldly gains, that people, receive in exchange to their labor. <sup>31</sup>However, al-Tusi leans more towards the second interpretation of the verse that is related to labor being financially compensated. <sup>32</sup> Al-Tusi refutes the claim that verse 32 in *surat al-Nisaa’* may refer to the share of men or women in inheritance, seeing that he explained that the verb *iktasab* (earning) stated in the verse entails that one exerted physical effort, which is not applicable to inheritance in which one gain

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<sup>28</sup>al-Ṭabarī, Maḥmūd M. Shākir, and Aḥmad M. Shākir. *Tafsīr Al-Ṭabarī: Jāmi’ Al-bayān ‘an ta’wīl Al-Qur’ān*. Dār al-Ma’ārif, al-Qāhirah, 1954. Volume 3 p. 131

note: Some interpretations view that verse 32 in *surat al-Nisaa’* refers to the share of men and women in inheritance, such as that of al-Bughawwī (d. 1122), ibn-Ateya (d. 152), al-Khazīn (d.1325), al-Baqā’i (d. 1480) Abu al-Se’oud (d. 1544) and al-Alusi (d. 1854)

<sup>29</sup> ibid

<sup>30</sup> Al-Tawil, Muhammed. *Ishkaleyat al-Amwal al-Muktasabah Mudat al-Zawgeyah*, 1<sup>st</sup> ed. Ando, Fez, 2006, p.4

<sup>31</sup>Tūsī, Muhammad i. a., and Āghā Buzurg al-Ṭihirānī, Muḥammad Muḥsin. *al-Tibyan Fī tafsīr Al-Qur’ān*. al-Matḥa’ah al-‘Ilmīyah, al-Najaf, 1957, volume 3, p. 184-185

<sup>32</sup> Ibid, p. 185

income without exerting effort. Al-Baidawi (d. 1286) also agrees that verse 32 in *surat al-Nisaa'* states that every one is entitled to the financial proceedings of his/her labor.

<sup>33</sup>Furthermore, Atfish (d. 1820) in his *Taysir Al-tafsir* also stated that the verse means that both men and women will have a divine pre-estimated share of income/assets, from commerce and cultivation, so no one should aim for a different share. <sup>34</sup>

Similarly, the pre modern Muslim scholar who related the verse 32 in surat al-Nisaa' to monetizing labor is al-Kashani (d. 1679) in his *al-Saffi fi Tafsir Kalam Allah al-Waffi*, probably because in pre modern time the interpretation which dealt with the story of revelation of the verse was more prevailing. However, in modern time more Muslim scholars reverted back to linking verse 32 in *Surat al-Nisaa'* to be signaling that labor is the main source of income and that any labor exerted should be monetized.

Among the modern Muslim scholars who discussed the verse is Muhammed Abduh (d. 1905) who interprets that the verse is talking about the labor being the main source of income. <sup>35</sup>He draws his conclusion from the preceding verse (verse 31), which prohibited Muslims from stealing others' money. Then, Abduh explained that on the basis of this context the verse 32 prohibits people from envying one another. <sup>36</sup> Furthermore, he explains that the stories that talk about the reason why this verse was revealed are not correlated with its meaning. <sup>37</sup>

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<sup>33</sup>[www.altafsir.com](http://www.altafsir.com), accessed 15th of March 2018

<sup>34</sup> Muhammed Ibn Youssef ibn Issa Atfish: scholar of *tafsir*, literature and was an activist

Source: <http://islamport.com/1/trj/5053/6403.htm>, accessed 28<sup>th</sup> of December, 2017.

<http://www.altafsir.com>, accessed 1/12/2017

<sup>35</sup> Abduh, Muhammad, and Muhammad R. Ridā. *Tafsīr Al-Qur'ān Al-hakīm Al-Mushtahar Bi-Isim Tafsīr Al-Manār*. Dār al-Manār, Misr, 1324.p. 56

<sup>36</sup> *i*Bid.p. 57

<sup>37</sup> There are 3 stories that explain the reason of revealing this verse:

- 1- Um Salama told the Prophet (PBUH) that men perform jihad, and women do not. She asked to allow women to do jihad so as to have the same reward as men in the afterlife (Muhammed Abuh's interpretation, volume 5, p. 57)
- 2- Ikremma conveyed to the Prophet (PBUH) that women are asking to participate in jihad
- 3- Katadda and Al-sadi asked the Prophet (PBUH) to have their rewards to be doubled as their share in inheritance is double that of the women.

Abduh asserts that the verse states that men and women are to be compensated for what they worked for because the word *iktasb* entails those financial rewards are given in exchange of exerting labor and not to be entitled by procrastination.<sup>38</sup> Then he related this part of the verse with the first part “*And do not wish for that by which Allah has made some of you exceed others*” to negate that envy will lead to any rewards.” Furthermore, Abduh stated that the verse means that the only difference between men and women in their rewards is tied to the effort each makes and not their gender. “*And ask Allah of his bounty*” according to Abduh means that man or woman should perform their duties, and ask God for assistance. He gave the example of a farmer who should exert the effort and plant the land and then he should ask God for rain or blessing his harvest.<sup>39</sup> He confirmed his interpretation with the last part of the verse that states “*Indeed Allah is ever, of all things, knowing*”.<sup>40</sup> Thus, one may conclude that the verse indicates that labor is the main source of income.

Furthermore, according to Muhammad Jamal al-Din al-Qassimi (d.1914) verse 32 in *surat al-Nisaa’* is referring to the share of men and women in the proceeding of their labor which should be a right entitled to them.<sup>41</sup> Al-Qassimi explains that the section of the verse that states “*And ask Allah of his bounty*” according to him means that God is the owner of this world and it is He who allocates its blessings to people, as He sees fit, which indicates that the verse is related to acquiring income/wealth in this world, not in the afterlife as some interpreters suggests.<sup>42</sup> Abdul-Rahman ibn Nasser ibn al-Sa’adi (d. 1956) in his *Taysir al-*

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<sup>38</sup> Abduh, Muhammad, and Muhammad R. Ridā. *Tafsīr Al-Qur’ān Al-hakīm Al-Mushtahar Bi-Isim Tafsīr Al-Manār*. Dār al-Manār, Misr, 1324, p. 59

<sup>39</sup> Ibid, p. 61

<sup>40</sup> www.quran.com. Accessed 20<sup>th</sup> of February, 2018

<sup>41</sup> Muhammed Jamal al-Din al-Qassimi: Quranic text interpreter, born in 1866 in Damascus. Author of *Mahasin al-Ta’wil*.

Source: Qāsimī, Jamāl a., and Muhammad F. ‘Abd al-Bāqī. *Tafsīr Al-Qāsimī: Al-Musammā Mahāṣin Al-ta’wīl*. Dār Ihyā’ al-Kutub al-‘Arabīyah, al-Qāhirah., volume 5, p. 1209

<sup>42</sup> Such as: such as ibn-Sulaiman (d.767), al-Tha’albi (d. 1470) and Abu Bakr al-Jaza’iri (d. 1921) source:www.altafsir.com, accessed March 15th 2018

*Karim al-Rahman fi Tafsir Kalam al-Mannan*, agrees with the same interpretation.<sup>43</sup> Al-Sa'adi explained that whoever provides his/her physical labor to an economic activity in a manner that contributed to its development, should be rewarded monetary compensation (share the profits of from this activity).

Sayyid Qutb (d. 1966) shares the same interpretation of the verse with Abduh. In his "*fi Zilal Al-Quran*", he stated that the verse is talking about the worldly gains, and the importance of labor, as the only method of acquiring them.<sup>44</sup> He states that the verse started with prohibiting Muslims from envying others' wealth, skills or social status.<sup>45</sup> Qutub adds that the Islamic world view does not differentiate between genders as it perceives both genders as "*human beings*".<sup>46</sup> Anyone who exerted effort, should be rewarded. Thus, to Qutub, the verse also confirms that labor is a key source of income. He also does not accept the stories known about the reason for revealing this verse that are mentioned in several Qur'anic text interpretations.<sup>47</sup> He does not agree that there is a competition between men and women. Qutub further added that each gender has his/her own role, and they complement each other in a fair setting designed by God. Qutb states that he believes that the stories about the reason for revealing this verse were meant to demean women and deny them their right to work and their entitlement of rewards in exchange to their labor.<sup>48</sup> Moreover, Qutub questioned the story of Um Salama, because women too were able to participate in Jihad back then, which

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<sup>43</sup> Abdel-Rahman Al-sa'ady, born in 1307 hijri. Great Hanbali jurist. He interpreted the Quran in 8 volumes. Source: <http://islamport.com/1/trj/5068/151.htm>

<sup>44</sup> Qutb, Sayyid, '*Fī zilāl Al-Qur'ān*', Anonymous Translator(al-Ṭab'ah 2. edn, Cairo, Dār Ihyā' al-Kutub al-'Arabīyah, 1953), volume 2, p. 642

<sup>45</sup> Ibid

<sup>46</sup> Qutb, Sayyid, '*Fī zilāl Al-Qur'ān*', Anonymous Translator(al-Ṭab'ah 2. edn, Cairo, Dār Ihyā' al-Kutub al-'Arabīyah, 1953), volume 2, p. 634

<sup>47</sup> stories of revelation mentioned earlier.

Interpretations that relates the verse to the stories of revelations include that of Ibn al-Jawzi (d. 1201), Ibn Abdel-Salam (d. 1262), al-Qurtubi (d.1273), Ibn Kathir (d.1372) and Ibn 'Adel (d.1476)

source: <http://www.altafsir.com/> accessed 15th of March 2018

<sup>48</sup> Ibid, p. 644

raises the question of why she would ask the Prophet (PBUH) the permission to do so.<sup>49</sup> He adds that there are many examples of women participating in jihad in the times of the Prophet (PBUH). “*For men is a share of what they have earned, and for women is a share of what they have earned*”, according to Qutub, the right to work and earn money for women was granted to them by this verse, before the Western societies granted it to their women by hundreds of years.<sup>50</sup> He adds western feminist movements exerted a lot of effort for the western societies to grant women this right to work that is was already granted to women by the Qur’an. According to verse 32 in *surat al-Nisaa*, women are entitled to own property, work and earn rewards in the same manner as men.<sup>51</sup> According to Ibn ‘Ashur (d. 1973) the verse is not just talking about Muslims, it is related to the Jurisprudence of transactions with all people.<sup>52</sup> He explains that the word *nasib* (share) means a part of something, thus according to Ibn Ashur the verse refers to alms meaning that a share of any income acquired is to be attributed to God.<sup>53</sup> The word *Mimma* means any type of labor should be compensated, regardless of its magnitude. Thus, from the linguistic interpretation of the verse, one may conclude that it accentuates that labor should monetarily be compensated and that labor is a legitimate source of acquiring income/property ownership (*nasib*). Another contemporary Muslim scholar who agrees with the aforementioned interpretation of the verse is Muhammed Tantawi (d. 2010) who believes that verse 32 in *surat al-Nisaa* indicates that men and women are entitled to the money they both worked for.<sup>54</sup>

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<sup>49</sup> Qutb, Sayyid, *Fī zilāl Al-Qur’ān*, Anonymous Translator (al-Ṭab‘ah 2. edn, Cairo, Dār Ihyā’ al-Kutub al-‘Arabīyah, 1953), volume 2, p.644

<sup>50</sup> Ibid, p. 645

<sup>51</sup> Qutb, Sayyid, *Fī zilāl Al-Qur’ān*, Anonymous Translator (al-Ṭab‘ah 2. edn, Cairo, Dār Ihyā’ al-Kutub al-‘Arabīyah, 1953), volume 2, p. 645

<sup>52</sup> Muhammed Al-Taher Ibn Ashur, great scholar and Judge. Wrote commentary on Al-qatr and Al-Burda. Died in 1284

Source: Makhlūf, Muḥammad i. M. *Shajarat Al-nūr Al-zakīyah Fī ṭabaqāt Al-mālikīyah*. aDār al-Kitāb al-‘Arabī, Bayrūt, 1930, p. 392, entry: 1565HE

<sup>53</sup> [www. http://quran.ksu.edu.sa](http://quran.ksu.edu.sa), accessed 18<sup>th</sup> of December 2017

<sup>54</sup> [www.altafsir.org](http://www.altafsir.org), accessed 15<sup>th</sup> of March 2018

One may conclude from the previously mentioned interpretations of the verse, that verse 32 in *Surat al-Nisaa'* is discussing the right of ownership caused by labor (*iktisab*). Human beings, males or females, should get their compensation from any economic activity that they took part in in accordance to the verse. Those interpretations will be referred to in order to prove that the right of *al-Kadd wa al-Se'ayal* has its basis in the Qur'anic text. Those interpretations are shared among some classic and contemporary scholars and are aligned with the principle of justice stated in the Quran. Justice, being a principle of Islamic Jurisprudence, indicates that any effort done is to be financially compensated.

#### *Labor as a Source of Income and Wealth:*

In accordance to the interpretation of verse 32 in *surat al-Nisaa'* mentioned earlier, it is important to shed the light on some classic works that accentuate the importance of labor as an economic activity and legitimate source of income and acquiring wealth. For example, Ibn Khaldun (d. 1406), in his "*Muqaddimah*", emphasized on the importance of laborers working collectively to produce goods and services. According to him, collective labor would cause specialization of labor and thus a more efficient production process.<sup>55</sup> Ibn Khaldun added that specialized laborers are a key element in generating a production surplus, which will be exchanged among members of the society, hence creating wealth and causing societal change.<sup>56</sup> Thus, Ibn Khaldun argues that labor creates value added to capital that causes profits for capital owners. Ibn Khaldun added that businesses will only prosper is by encouraging laborers to increase their productivity, work according to their best interest, and aim at acquiring wealth through their labor.<sup>57</sup> He urged the state/government heads to work on protecting property rights and to encourage members of society to develop their wealth,

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<sup>55</sup>Khalid, Haniza. "The Role of Institutions in Driving Economic Change: Comparing the Thoughts of ibn Khaldun and Douglass C. North." *Intellectual Discourse*, vol. 23, no. 2, 2015, p.6

<sup>56</sup>Ibid, p. 7

<sup>57</sup> Mouhammed, Adil H. "Ibn Khaldun and the Neoliberal Model." *History of Economic Ideas*, vol. 12, no. 3, 2004, JSTORp. 89

through their labor.<sup>58</sup> Ibn Khaldun explained that labor is a factor that should estimate the value of goods and services by giving the example of craftsman, who without his labor, his capital would have remained in its initial form, with less economic value.<sup>59</sup>

Furthermore, Locke's Labor theory of value demonstrates that labor is the determinant factor of setting commodities prices. According to the labor theory of value, all commodities are produced mainly or exclusively by labor.<sup>60</sup> Thus, the price of a commodity is determined by the amount of labor used to produce it. The importance of the capital used in production is not neglected, however, labor as a factor of production is the main determinant of the price. John Locke further stated that ownership of goods and lands should be based on the effort exerted by an individual to produce those goods or to cultivate those lands.<sup>61</sup> According to Locke, one has ownership over his/her body, and thus. Ownership of his/her labor that he/she provides.<sup>62</sup> Therefore, one has the right to the proceedings of that labor.<sup>63</sup> Locke explained that labor "*is responsible for 99/100 of the value of the products of the earth*".<sup>64</sup> He meant that without the human factor, no goods could be created, and no services could be provided.<sup>65</sup> He extends his argument by stating that each person has the right to transfer the products he/she participated in its production by his/her labor. Thus, one may conclude that human labor is the main determinate of value. The following statement by Locke further enhances this present study's argument in regards to women's labor in the household:

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<sup>58</sup> Weiss, Dieter. "Ibn Khaldun on Economic Transformation." *International Journal of Middle East Studies*, vol. 27, no. 1, 1995, JSTOR, p. 31

<sup>59</sup> Mouhammed, Adil H. "Ibn Khaldun and the Neoliberal Model." *History of Economic Ideas*, vol. 12, no. 3, 2004, p. 89

<sup>60</sup> Locke, John, and ProQuest (Firm). *Second Treatise of Government*. Alex Catalogue, Raleigh, NC, 2001. Article 27, p. 13

<sup>61</sup> <http://austrianconomics.org/> accessed, 14th of March 2018

<sup>62</sup> Locke, John, and ProQuest (Firm). *Second Treatise of Government*. Alex Catalogue, Raleigh, NC, 2001

<sup>63</sup> Christman, John. "Can Ownership Be Justified by Natural Rights?" *Philosophy & Public Affairs*, vol. 15, no. 2, 1986, JSTOR, P. 160

<sup>64</sup> *ibid*

<sup>65</sup> Locke, John, and ProQuest (Firm). *Second Treatise of Government*. Alex Catalogue, Raleigh, NC, 2001. Article 36, P. 16

*“When it is beyond what morality requires them to do for others, people deserve some benefit for the value their labor produces. These benefits should be proportional to and fitting for the types of labor done. When nothing but property rights in the things produced are fitting benefit for the labor, the property rights are deserved”.*<sup>66</sup>

Locke clearly stated that any kind of labor exerted should be compensated for all the benefits it produces. This correlates with the aim of the right of *al-Kadd wa al-Se'aya*, that any labor exerted should be monetized and compensated. Locke emphasized that even voluntarily labor should be compensated. He further added that if, for example, the work of someone cannot be evaluated therefore she/he is entitled to own property in return to her/his effort.<sup>67</sup> This argument can be extended to women's labor in the household. Women provide labor that is not obligatory, thus in accordance to labor theory of value, their labor should be monetarily compensated. Compensation can take the form of money or rights of ownership, in the wealth women participated in developing.

Similarly, Karl Marx in his “*Capital*”, follows the same line of reasoning as that of Locke's wherein the former stated that all products have two dimensions. The first dimension is satisfying a need, and the second is the ability of the product to be exchanged/traded. Marx thus added that for commodities to be exchangeable, they must have something in common to measure their value in exchange of each other and thus be able to trade/exchange them. Accordingly, the common factor here according to Marx is labor.<sup>68</sup> Commodities will be valued according to the amount of labor used to produce them, and exchanged accordingly. Marx further stresses that labor should be monetized and compensated. Accordingly, it can be

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<sup>66</sup>Christman, John. “Can Ownership Be Justified by Natural Rights?” *Philosophy & Public Affairs*, vol. 15, no. 2, 1986, JSTOR, P. 166

<sup>67</sup> Ibid,

<sup>68</sup>Ehrbar, Hans, and Mark Glick. “The Labor Theory of Value and Its Critics.” *Science & Society*, vol. 50, no. 4, 1986, JSTOR, p. 465



concluded that women's labor in the household should be monetized and compensated. Furthermore, Adam Smith seconded Locke's and Marx's argument in his "*Inquiry into the Nature and the Causes of the Wealth of Nations*". According to Smith, "*the real price of everything is toil and the trouble of acquiring it*".<sup>69</sup> Thus, Smith was able to monetize labor, by setting a price of the commodities they produce according to the effort exerted in its production. Again, a classic economist refers to the importance of labor in production, and stresses that labor should be monetized and compensated.

Ibn Khaldun, Locke, Smith and Marx all agreed that labor is the main source of estimating the value of the products (goods and services) seeing as that without labor, nothing could have been created. In addition, they agreed that labor is the key source of acquiring wealth in a healthy economic context. As demonstrated, labor is the main factor in setting the value of all commodities. Thus, labor is the main source of acquiring income (profit) and property (wealth), since it should be monetized and compensated.

#### *Monetized versus Non-Monetized Women's Labor:*

One may argue that the right of ownership is well established in Islamic jurisprudence. Islam encourages Muslims to accumulate wealth through ownership of capital via their labor.<sup>70</sup> In pre-modern Islamic societies, it was well established for women to work, gain income and use that income to acquire property. During the pre-modern era of the Ottoman Empire, in pre modern times women's income came from inheritance, dowry, earning from their daily work, profit from trade and investments or income from inherited *waqf*.<sup>71</sup> Furthermore, according to Shatzmiller, women mainly participated in the labor market through agriculture

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<sup>69</sup>Collins, Jane L. "Expanding the Labor Theory of Value." *Dialectical Anthropology*, vol. 40, no. 2, 2016, pp. 103-123

<sup>70</sup>Kamali, Mohammad H., and Islamic Texts Society. *The Right to Life, Security, Privacy and Ownership in Islam*. vol. 5., Islamic Texts Society, Cambridge, U.K, 2008 p. 245

<sup>71</sup>Sonbol, Amira E. A. *Women of Jordan: Islam, Labor, and the Law*. Syracuse University Press, Syracuse, NY, 2003, p. 71

and textile industry in the 10<sup>th</sup> Century.<sup>72</sup> Women were working as spinners, embroiders and brokers in exchange for wage which, according to Shatzmiller, increased divorce rates in the *Mamluk* era, because women were able to sustain themselves financially, thus there was no need to remain in unhappy marriage.<sup>73</sup> Women's participation expanded in the 15<sup>th</sup> century in Egypt when women were able to live independently and support themselves, by working as wet nurses (*mordi'a*), hairdressers (*mashta*), match makers (*khatba*), washers of the dead (*ghasila*) and mourners of the dead (*na'iha*), actresses, doctors, religious scholars, market inspectors, brokers and sellers (*dallala*), in addition to classical jobs held by women such as spinners and weavers.<sup>74</sup> Also, the records prove an increase in the property owned by women. According to El-Saadi, women did not use their income just to sustain the daily lives of them and their families, however they invested their income.<sup>75</sup> Women bought new capital to be used in their businesses and slaves to help them, which also granted them the ability to buy and rent real estates.<sup>76</sup> In the *Mamluk* era, even spouses used hire each other to perform certain tasks for each other in exchange for a fee.<sup>77</sup> Furthermore, it was acceptable in the *Mamluk* society to monetize spouses' labor in the development of the matrimonial wealth and get compensated for that. One example that Shatzmiller uses is when a husband asked his wife to get financially compensated for representing her in an estate division, with the justification that he could have spent his time and effort in developing his own wealth. Thus, it was acceptable in pre-modern Islamic societies to monetize and compensate one another

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<sup>72</sup>Shatzmiller, Maya, Harvard Law School. Islamic Legal Studies Program, and Joint International Law Program. *Her Day in Court: Women's Property Rights in Fifteenth-Century Granada*. vol. 4, Islamic Legal Studies Program, Harvard Law School, Cambridge, Mass, 2007. P. 150

<sup>73</sup> Ibid, p. 151

<sup>74</sup>Source: El-Saadi, Hoda, "Women and Urban Economy in Islamic Egypt", Women and Memory Forum, 2007, p. 3-5

This proves that there are many women who remain married, because of financial need. Part of this need is because their role in the development of the matrimonial wealth is not monetized and acknowledged.

<sup>75</sup> El-Saadi, Hoda, "Women and Urban Economy in Islamic Egypt", Women and Memory Forum, 2007, p. 7

<sup>76</sup> ibid, p.8 and p. 10

<sup>77</sup> Ibid, p. 167

for his/her labor, even between spouses. Also, as illustrated, it was acceptable for the women to acquire income in exchange for her labor and acquire property.

#### *Monetizing Breastfeeding in the Quranic Text:*

Among the economic activities that entail labor and yield benefit that women perform without compensation is breastfeeding.<sup>78</sup> Although this right is stated in *Surat al-Talaq* verse 6.

The verse reads as follows:

*“Lodge them [in a section] of where you dwell out of your means and do not harm them in order to oppress them. And if they should be pregnant, then spend on them until they give birth. And if they breastfeed for you, then give them their payment and confer among yourselves in the acceptable way; but if you are in discord, then there may breastfeed for the father another woman”.*<sup>79</sup>

According to al-Tabari (d. 923), the verse indicates that mothers are entitled to a wage in exchange to breastfeeding their children to be paid by the father.<sup>80</sup> The same interpretation was seconded by al-Razi (d. 1210) who adds that since the milk is owned by the mother, she is entitled to “sell” it to the child, and the father in this case should pay for it.<sup>81</sup> Similarly, other classic Qur’anic text interpreters agree to the same interpretation stated before such as al-Zamakhshari (d. 1143), al-Baidawi (d.1286) and al-Suyuti (d. 1459). As for Islamic jurisprudence, the scholars who belong to the Hanbali and Shaffi’i schools of Islamic Jurisprudence, mostly agree that the mother is entitled to be monetarily compensated for

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<sup>78</sup>Weeks, Jacquilyn. "Un-Re-Productive Maternal Labor: Marxist Feminism and Chapter Fifteen of Marx's Capital." *Rethinking Marxism*, vol. 23, no. 1, 2011, p.33

<sup>79</sup>[www.quran.com](http://www.quran.com). Accessed 21<sup>st</sup> of February, 2018

<sup>80</sup>[www.altafsir.com](http://www.altafsir.com), accessed 15<sup>th</sup> of March 2018.

<sup>81</sup>[www.altafsir.com](http://www.altafsir.com), accessed 15<sup>th</sup> of March 2018.

breastfeeding her child by the child's father.<sup>82</sup> The compensation is set by agreement between the spouses. If they do not agree, a wise member from their family is to be consulted to set the compensation value.<sup>83</sup> Most scholars of the Hanafi School of jurisprudence, agree that the wife is not entitled to a monetary compensation for breastfeeding her child; only if the parents got divorced, then the mother is entitled to get financially compensated for breastfeeding their child.<sup>84</sup>

According to al-Wansharishi (d. 1508), women are entitled to a wage in exchange for breastfeeding their children.<sup>85</sup> If *'urf* of a certain society entails that women from high a social class are not expected to breastfeed their children, then they are not obliged to do. Al-Wansharishi gave the exception, if the child does not accept to be breastfed by other women, then the wife (mother) is obligated to breastfeed her/him, but still she is entitled a wage.<sup>86</sup>

In this verse, it is mentioned that an ex-wife is entitled to be financially compensated for breastfeeding her children. To the extent that, if the husband cannot provide an adequate financial compensation for her, another woman (wet nurse) is to breastfeed the child. Thus, the Qur'anic text realizes that breastfeeding is an exhausting process for the woman's body. As Professor Martina Rieker stated in the interview, "*Islam realizes that a woman's body turns into a machine*", this entitled to financial compensation.<sup>87</sup> As such one could conclude that the Qur'anic text acknowledged that any activity that yields benefit and dictates effort is

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<sup>82</sup>Abū Zahrah, Muḥammad. *al-Aḥwāl Al-shakhṣīyah*. publisher not identified, al-Qāhirah, 1957, p. 402

<sup>83</sup>ibid

<sup>84</sup>Abū Zahrah, Muḥammad. *al-Aḥwāl Al-shakhṣīyah*. publisher not identified, al-Qāhirah 1957, p. 403

<sup>85</sup> Abu Al-Abbas Ahmed ibn Yehia Al-Wansharissi. He was a Mufti. Student of Abi al-Fadl al-'Aqbanni. He is the author of *al-Me'iar* in 12 volumes. He commented on Ibn Al-hajib al-Far'ey and Watha'eq al-Fishtalli. Died in 914

Source: Makhḷūf, Muḥammad i. M. *Shajarat al-Nūr al-Zakīyah Fī Tabaqāt al-Mālikīyah*. Dār al-Kitāb al-'Arabī, Bayrūt, 1930, p. 275

<sup>86</sup>Wansharīsī, Ahmad i. Y., and Muḥammad Hajjī. *al-Mi'yār Al-mu'rib Wa-Al-jāmi' Al-Mughrib 'an fatāwā 'ulamā' Ifrīqīyah Wa-Al-Andalus Wa-Al-Maghrib*. Dār al-Gharb al-Islāmī, Bayrūt, 1981, volume 4, pp. 25-26

<sup>87</sup> Martina Rieker: Assistant Professor at the American University in Cairo, and the Director of Cynthia Nelson Institute for Gender and Women's Studies. Source: Rieker, Martina. Personal Interview. 5<sup>th</sup> of December 2017.

to be considered labor that should be monetized and financially compensated even as natural as breastfeeding.

*Non-monetized women's labor:*

Extending the Marxist's notion of labor to women's labor in the household is applicable because women's labor in the household yields benefits and occupies women's otherwise would have been free/leisure time; which are the two categories on which Marx evaluate what constitute labor.<sup>88</sup> As Marx explains that accumulation of wealth happens when one can free his time and yet sustain the same economic status (work less time).<sup>89</sup> In this case, women are freeing more time for men that they would have worked to pay for the labor they are performing in the household, for example, men will have to pay for a cooker, driver and tutor. Thus women's labor in the household can be classified as Informal economic activity.<sup>90</sup> An additional definition of informal labor is that by Hoyman who defines informal labor as the type of work which does not require the worker to pay income taxes. Hoyman gave the example of semi economical labor performed by women such as harvesting, feeding the cattle in rural areas, dropping off children to sports classes, schools and tutoring them in urban areas. The household labor performed by women includes tasks such as cooking, cleaning, raising children, laundry, and shopping for the household.<sup>91</sup> Such tasks are inevitable but with little intrinsic rewards.<sup>92</sup> Working women often consider household labor as a second job.<sup>93</sup> In addition, both working and nonworking women often feel that their role

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<sup>88</sup>Goodman, Robin T. *Gender Work: Feminism after Neoliberalism*. Palgrave Macmillan, New York, NY, 2013. P. 20

<sup>89</sup> *ibid*

<sup>90</sup>Hoyman, Michele. "Female Participation in the Informal Economy: A Neglected Issue." *The Annals of the American Academy of Political and Social Science*, vol. 493, 1987, p.65,

<sup>91</sup>Shaw, Susan M. "Gender Differences in the Definition and Perception of Household Labor." *Family Relations*, vol. 37, no. 3, 1988, p. 333

<sup>92</sup>Walters, Peter, and Gillian Whitehouse. "A Limit to Reflexivity: The Challenge for Working Women of Negotiating Sharing of Household Labor." *Journal of Family Issues*, vol. 33, no. 8, 2012, p. 1117.

<sup>93</sup>Shaw, Susan M. "Gender Differences in the Definition and Perception of Household Labor." *Family Relations*, vol. 37, no. 3, 1988, p. 333

in the household is being monitored and harshly evaluated by the society.<sup>94</sup> Furthermore, 78.5% of women perceive household labor as obligatory which according to Shidh and Basu, this is because household labor is not recognized as an economic activity. This is despite the fact that women work, inside and outside the household, more hours than men.<sup>95</sup> Moreover, according to Shidh and Basu, “*the poorer the household, the longer hours women work*”.<sup>96</sup> This is evident in lower socioeconomic classes, where women have more than one job to sustain the household. For example, the porter’s wife will be cleaning cars, houses and making errands to the building’s inhabitants, besides taking care of cattle in order to yield income. In most societies, women do the household work, regardless of being employed in the market or not.<sup>97</sup> Consequently, women’s ability to have a successful career as well as being financially secure is hindered by the full responsibility of the housework.<sup>98</sup>

Having more responsibilities in the household than men, women have less access to material resources in the labor market, thus woman would not be an “*ideal employee*”.<sup>99</sup> Hence, this would entail no maternity leaves and less working hours. Such leaves and strict working hours are necessary for women to fulfill their household duties. As a result, women are discriminated against and underappreciated even though they exert tremendous efforts to keep up with the different responsibilities. According to Young, the existing social division

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<sup>94</sup> Shaw, Susan M. “Gender Differences in the Definition and Perception of Household Labor.” *Family Relations*, vol. 37, no. 3, 1988, p., p. 355

<sup>95</sup> *ibid*

<sup>96</sup> Shiv Narayan Sidh, and Sharmistha Basu. “Women’s Contribution to Household Food and Economic Security: A Study in the Garhwal Himalayas, India.” *Mountain Research and Development*, vol. 31, no. 2, 2011, p. 102

<sup>97</sup> *ibid*

<sup>98</sup> Walters, Peter, and Gillian Whitehouse. “A Limit to Reflexivity: The Challenge for Working Women of Negotiating Sharing of Household Labor.” *Journal of Family Issues*, vol. 33, no. 8, 2012, pp. 1117-1139.

<sup>99</sup> Shiv Narayan Sidh, and Sharmistha Basu. “Women’s Contribution to Household Food and Economic Security: A Study in the Garhwal Himalayas, India.” *Mountain Research and Development*, vol. 31, no. 2, 2011, p. 102

of household labor based on gender, gives men preferential advantage in the labor market than women do not receive equally, which is a form of exploiting women.<sup>100</sup>

Working women in rural areas vary in terms of the type of work, the ownership of the workplace, and their level of contribution to the household finances. According to Shidh and Basu, women in rural areas perform many economic activities that are not taken into economic calculations. Despite the difficulties and lack of valuation, mothers in the urban areas tend to increasingly participate in the labor force.<sup>101</sup> This means that women are responsible for household chores, raising children as well as working outside of the household to contribute to its finances simultaneously. Thus, “*Women continue to shoulder much greater responsibility for household labor*”, because the ‘urf shaped their role in the household in this manner.<sup>102</sup> Furthermore, as Bryson points out, it is not in the interest of men to forego their freer time and lesser responsibilities in the household, thus men will continue to advocate having patriarchal societies that divides household responsibilities based on gender.<sup>103</sup> Bryson added that it is not in the interest of capitalist societies to monetize and financially compensate women labor in the household, as it will entail less income, resulting from either expecting less labor from male employees, as they will need more time to provide their labor in the household, or allocate more funds for women, as their labor in the household will be recognized as opportunity costs that should be financially compensated to women by their employers. According to Delphy and Leonard, the unpaid women’s labor in the household is to be regarded as subsidies to husbands’ wages, since women are providing

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<sup>100</sup>Bryson, Valerie. "Marxism and Feminism: Can the 'Unhappy Marriage' be Saved?" *Journal of Political Ideologies*, vol. 9, no. 1, 2004, p. 21

<sup>101</sup>Artis, Julie E., and Eliza K. Pavalko. “Explaining the Decline in Women's Household Labor: Individual Change and Cohort Differences.” *Journal of Marriage and Family*, vol. 65, no. 3, 2003, p. 746

<sup>102</sup>ibid

<sup>103</sup>Bryson, Valerie. "Marxism and Feminism: Can the 'Unhappy Marriage' be Saved?" *Journal of Political Ideologies*, vol. 9, no. 1, 2004, p.21

services/labor that husbands should pay for.<sup>104</sup> This illustrates the reason opposition exists towards financially evaluating women's labor in the household and acknowledging its contribution to the (patriarchal) economy and compensating women for it. Although, women's roles in the household have an economic value, they are not monetized, which denotes economic injustice borne on women.

### **Conclusion:**

According to verse 32 in *Surat al-Nisaa'* any labor exerted should be monetized and compensated. Even natural tasks that are only performed by women, such as breastfeeding, are to be monetized and compensated, as clearly stated in the Qur'anic text. This concept should be extended to the non-monetized role of women in the household and its impact in developing the matrimonial wealth. Given the change in the social and economic context, families are not to be sustained having one breadwinner, in addition to women being solely responsible for household chores and child care as established by '*urf*'. Thus, there is an economic injustice borne on women, which involves their labor not being monetarily evaluated and compensated by allocating them a share in the matrimonial wealth that they helped in its development. Economically acknowledging women's labor in the household probably will probably lay down the foundation of women's full integration in the society and the economy. "*The aim of the Islamic society is to fulfill the intentions of the Quran with regard to rights, responsibilities, potentialities, and capacities of all its earnest members, then those who truly believe in the Quran would equally wish for the woman the opportunities for growth and productivity which they demand for men*".<sup>105</sup> According to Wadud, it is a divine order to acknowledge women's economic role in the society and

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<sup>104</sup>Weeks, Jacquilyn. "Un-/Re-Productive Maternal Labor: Marxist Feminism and Chapter Fifteen of Marx's Capital." *Rethinking Marxism*, vol. 23, no. 1, 2011, p.33

<sup>105</sup>Wadud, Amina. *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective*. Oxford University Press, New York, 1999, p. 91



rewarding her financially for her labor. The Qur'anic text has a clear objective which is to eliminate any type of injustice such as the injustice occurring in denying one's financial return in exchange of his/her labor is injustice. Verse 32 in *surat al-Nisaa'* was very clear in stating that any labor exerted should be monetarily compensated, thus making the basis of the right of *al-Kadd wa al-Se'aya*. In the coming chapter, the basis of the right of *al-Kadd wa al-Se'aya* in Islamic jurisprudence will be illustrated. Islamic jurisprudence can embody the right of *al-Kadd wa al-Se'aya*, since its main objective is to translate the main *maqasid* (intentions) of the Qur'anic text into reality.

## Chapter Two: The Right of *al-Kadd wa al-Se'aya* in Islamic Jurisprudence

Moving from the Qur'anic basis of establishing the right of ownership derived from labor as a basis for economic entitlement, this chapter aims at investigating how wives' labor in the household is translated into a specific share of the matrimonial wealth in Islamic jurisprudence through the right of *al-Kadd wa al-Se'aya* which was acknowledged and debated by sharia courts in some pre-modern Islamic societies.<sup>106</sup> However, many of these societies then abandoned the *shari'a* courts, and adopted the Western status laws of imperial countries, when they were colonized. This entailed applying a unified law to all cases of marriage and divorce based on that of the colonized country's legal system, which was still applied after those countries gained their independence. In this transition from having *shari'a* courts that made their verdicts on a case-by-case basis derived from Islamic *shari'a* to having a unified code of laws, the right of *al-Kadd wa al-Se'aya* was abandoned because it was not common in the colonized countries legal systems.<sup>107</sup>

Today most Muslim countries refer to Islamic jurisprudence in shaping their personal status laws thus there is a need to establish the soundness of the right of *al-Kadd wa al-Se'aya* from an Islamic jurisprudential perspective. This chapter aims at illustrating the legitimacy of the concept of *al-Kadd wa al-Se'aya*, in the Islamic jurisprudence. Special attention will be dedicated to Ahmed Ibn 'Ardun's *fatwain* allocating half of the development in the matrimonial wealth to the wife in case of divorce as will be illustrated. Also, it will serve as an attempt to demonstrate the extent of the applicability of adopting this right in pre-modern Islamic societies through examining early *shari'a* court records, followed by illustrating

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<sup>106</sup> Shari'a court based their judgement on Islamic jurisprudence versus common courts which base theirs on codified legal codes.

<sup>107</sup> Please refer to chapter three.

several Islamic jurisprudential concepts that can be referred to in adopting the right of *al-Kadd wa al-Se'aya* in modern times, as opposed to *'urf* in the pre modern Muslim societies.

*Early Jurists View of the Right of al-Kadd wa al-Se'aya:*

The right of *al-Kadd wa al-Se'aya* is not a novel concept (*bida'a*).<sup>108</sup> The pre-modern jurists advocated the right of *al-Kadd wa al-Se'aya* based on the notion that marriage forms a financial partnership, that does not need a legal contract to singularize and acknowledge its existence (other than marriage contract).<sup>109</sup> This clandestine partnership shaped the role of the spouses in a complementary manner, in which both spouses contributed in the development of the matrimonial wealth, thus they would each be entitled to a share of it. However, the study was not successful in decoding the manner in which the pre-modern jurists specify how women's labor is to be calculated nor the manner according to which the share in the matrimonial wealth will be shared, as will be later illustrated. Moreover, the medieval Muslim jurists debated the soundness of the right of *al-Kadd wa al-Se'aya* as early as the 9<sup>th</sup> century, when Abdul Rahman Ibn al-Qassim (d.806) was asked whether a wife who works in her husband's land is considered an economic partner alongside husband or not? Ibn al-Qassim differentiated between whether she did so voluntarily or was she obliged to.<sup>110</sup> He explained that if the wife worked in the land voluntarily, then she would not be entitled to a wage/partnership. However, if she meant partnership, then she is entitled to it. Ibn al-Qassim added that if at the beginning of the marriage the wife did not state whether she will provide labor in her husband's land voluntarily or not, then she is required to take an oath, that she

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<sup>108</sup>Bid'a (invention): a novel practice that contradicts a known aspect of religion.

Source: al-Bid'a. (1983). in: *al-Mawso'a al-Fiqhiyyah*, 2nd ed. Kuwait: Kuwaiti Ministry of Awqaf and Islamic Affairs. Chapter 9, p. 17

<http://www.islamport.com>, accessed 30<sup>th</sup> of December, 2017.

<sup>109</sup> Ibn 'Abd al-Salām, a. (2010). *Mina Al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam p. 71

<sup>110</sup>Abdel Rahman ibn al-Qassim: Maliki Egyptian Jurist. Author of *al-Mudawannah* composed of 16 volumes. Source: Ibid, p. 46

meant partnership retroactively, which in this case would entitle her to a partnership.<sup>111</sup> The same view was also shared by Abu al-Walid Ibn Rushd (d. 1198) and Abu Abdullah Ibn al-Haj (d. 1336).<sup>112</sup>

Furthermore, Abu Amran al-Fasi (d. 1039) stated in his *al-Nawader*: that if a husband brought his wife wool and she weaved it, then she is a partner in the value of the product of wool weaved.<sup>113</sup> Also in *al-Manhal al-Azeb al-Salsabeel*, a poem that emphasized that a wife is entitled to be compensated for her *sa'y* and financial contribution in the household.<sup>114</sup> In the verses, a jurist states that the person who accords the bride's shower, should be very accurate in his recording.<sup>115</sup> This is because, if the marriage dissolves, she gets compensated for her labor in the household accurately and with fairness to her husband.<sup>116</sup>

In the 16<sup>th</sup> century; when Abu Muhammed (d. 1588) in *al-Nawaderwa al-Zeyadat 'ala Ma fi al-Mudawanna min Ghayreha mina al-Omahat* stated that if spouses were working together wherein one spouse owns the capital, and the other spouse contributes through labor, then an economic partnership is formed.<sup>117</sup> This partnership, according to Abu Muhammed, entails either giving the latter spouse a wage in exchange for his/her labor, or considering him/her an

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<sup>111</sup> Al-Mazkaldy, Omar. 2005. *Haq al-Kadd wa al-Se'aya Muhawalat fi al-Ta'sil*. Master Thesis. Muhamed al-Khamis, p.46

<sup>112</sup> Ibid, p. 46

<sup>113</sup> Ibid, p.68. Musa Ibn Isa ibn Abi Haj Abu 'Imran al-Fasi. Died in 1039. Maliki Jurist. Author of *al-Ta'alik 'ala al-Mudawannah*.

Source: [www.islamport.com](http://www.islamport.com), accessed 30<sup>th</sup> of December, 2017.

<sup>114</sup> Ibn 'Abd al-Salām, a. (2010). *Mina Al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam, p. 68  
Abu Zayd Al-Gashtimi: Ahmed ibn Abdel Rahman ibn Abdullah Al-Geshtimi. Born in 1816. Died in 1909. Poet and Teacher.

Source: Yūsuf, Muḥammad K. R., and Khayr a. Ziriklī. *Tatimmat Al-Alām Lil-Ziriklī: Wafayāt 1397-1415 H/1977-1995 M*. Dār Ibn Hāzm, Bayrūt, Lubnān, 1998, volume 5, p. 51

<sup>115</sup> Translation, mine

Source: Ibn 'Abd al-Salām, a. (2010). *Mina Al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam, p. 68

<sup>117</sup> Abdullah ibn Abdel-Rahman Abu-Zayed al-Qayrawan Abu Muhammed. Died in 996. Maliki Jurist. His book *al-Nawader* is composed of 100 chapters. He is the author of *Risalah fi al-Rad 'ala al-Qadireyah*, *al-Ma'refah wa al-Tafsir*, *al-Ikteda' bi Madhab Malik*, and others  
Source: [www.islamport.com](http://www.islamport.com), accessed 30<sup>th</sup> of December, 2017.

owner of a share in the development occurred of the matrimonial wealth since the start of the marriage.<sup>118</sup>

The jurist Muhammed Ibn-Nasser (d. 1642), who stated that women are entitled to the equivalent of the labor she exerted to the development of their husband's property, since the first day of marriage.<sup>119</sup> Furthermore, al-Tammali (d. 1657) who stated in *Ajwebet Al Muta'khreen*; that if the spouses were collaborating in a business, the value of services/assets which serves as a product of such a cooperation is to be shared among the spouses in proportion to their contribution.<sup>120</sup> Ibrahim al-Gailani (d. 1707) in his *fatwa* (jurist's opinion) in response to whether a woman who performs household chores such as cooking, baking, etc in addition to tending to cattle, weaving...etc should be entitled to a share in the matrimonial wealth as a partner with her husband and children or not, his reply indicated that if the money was the product of her labor, then she is a partner in the matrimonial wealth, in proportion to her labor.<sup>121</sup> However, Al-Gilani was not clear in regards to the methodology of measuring the wife's labor and her contribution to the development of the matrimonial wealth.

Muhammed Ibn Abi al-Qasim (d. 1800) stated in *al-Ihkam li Masa'el al-Aahkam*; that Imam Malik and his companions agreed that every woman who provides labor in the household is a

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<sup>118</sup> Ibn 'Abd al-Salām, a. (2010). *Mina Al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam, p. 72

<sup>119</sup> Ka'was, Miloud, 2009, *Haq al-Zawigh fi al-Kadd wa al-Se'aya*, al-Rabat. Markaz al-Dirasat wa al-Abhath wa Ihya' al-Turath, al-Rabitah al-Muhammadiyah lil-'Ulama, p.38

<sup>120</sup> ibid

Abduallh ibn Ibrahim ibn Ali al-Tammali. Died in 1657. Maliki Jurist in Sous.

Source: Source: Yūsuf, Muḥammad K. R., and Khayr a. Ziriklī. *Tatimmat Al-Alām Lil-Ziriklī: Wafayāt 1397-1415 H/1977-1995 M*. Dār Ibn Ḥazm, Bayrūt, Lubnān, 1998, volume 4, p. 63  
www.islamport.com, accessed 30<sup>th</sup> of December, 2017.

<sup>121</sup> The Arabic text below, Translation, mine

و من أمثلة ذلك أن إبراهيم الجيلاني سئل عن امرأة تخدم في بيتها خدمة ظاهرة من عجيب و طبع و غير ذلك من رعاية البهائم و الباطنة من غزل و نسج و نحوها  
فهل لها شريك في المال المذکور و نتج بسبب خدمتها المال من الماشية و الغلات و غير ذلك ففي شريكه بخدمتها، وأولادها بقدر سعايتها  
زوجها وأولادها في المال أم لا؟ فأجاب:

partner with her husband in the wealth produced as a product of her labor.<sup>122</sup> Additionally, Abu Hafs Umar ibn Abdel Aziz al-Garsifi al-Sussi (d. 1862) stated that to know whether females have a share in the matrimonial property, one should differentiate between wives and daughters. Al-Garsifi explained that the wife is entitled to earnings from her labor in the household which caused development in the matrimonial wealth since the first day of marriage until the date of her death or divorce. However, daughters' *kadd* is calculated from the date they can work until their death or marriage. Then, those dates are compared to the date of purchasing a property, to be able to calculate their share in the property, in accordance to their *kadd*.<sup>123</sup> Furthermore, in *al-Ajweba al-Nasireya* a question regarding the manner in which the matrimonial wealth could be divided in case of divorce if both spouses contributed their labor in the development of it.<sup>124</sup> The answer was that the wife should take her share in the development in the value of her husband's property calculated from the first day of marriage, with the aid of a financial expert.<sup>125</sup>

Lastly, the Maliki Mufti al-Mahdi al-Wazzani (d. 1923) advocated the concept of *al-Kadd wa al-se'aya* when he was asked about a man who wanted to have all the matrimonial wealth, that he and his wife worked together for. Al-Wazzani objected the action of the husband stating that the wife is a partner in the matrimonial wealth. However Al-Wazzani differentiated between the method of compensating the wife's labor based on the role she performed; for example, if a woman is helping her husband in cultivating the land, then she is

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<sup>122</sup> Translation, mine

Source: Ibn 'Abd al-Salām, a. (2010). *Mina Al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam, p.71

<sup>123</sup> translation, mine

Umar Ibn Abdel-aziz Al-Garsifi: died in 1862. Maliki Jurist. Author of Riislah Fi Al-hisba, Sharh Manzumat Al-fara'id, 'Inwan Al-Ibana wa Al-Tibian fi Nakd Fatwa Al-ragragi Al0Tamli Ibn Sasan, Risala Fi Kayfeyat Kasem Al-Tarika

Source: Yūsuf, Muḥammad K. R., and Khayr a. Ziriklī. *Tatimmat Al-Alām Lil-Ziriklī: Wafayāt 1397-1415 H/1977-1995 M*. Dār Ibn Ḥazm, Bayrūt, Lubnān, 1998, volume 5, page 51

<sup>124</sup> Ibn 'Abd al-Salām, a. (2010). *Mina Al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam, p.71

<sup>125</sup> Translation, mine. Source: iBId, p. 71

entitled to half the harvest.<sup>126</sup> If the wife is helping her husband to tend to the cattle, then she is entitled to a wage.<sup>127</sup> According to al-Wazzani, the lands and cattle will remain the ownership of the husband, however the proceedings of the spouse's labor are to be shared. Indeed, the debate regarding the right of *al-Kadd wa al-Se'aya* was present and incorporated into the marriage process. The right of *al-Kadd wa al-Se'aya* was acknowledged and granted to women by pre modern Muslim scholars to compensate them for their labor. All the previously mentioned opinions allocated a percentage of the matrimonial wealth to the wife for her labor in accumulating the matrimonial wealth. However, the pre modern Muslim Moroccan *Qadi* (judge) and *Mufti* (Jurist), Ahmed ibn 'Ardun (d. 1584) affirmed that that women should get half the matrimonial wealth upon divorce or death of the husband.<sup>128</sup> Ibn 'Ardun's fatwa regarding the share of the wife in the matrimonial wealth will be discussed in the following section, with analysis to its context, advocates, and jurisprudential soundness.

*Ibn 'Ardun (1541- 1584):*<sup>129</sup>

His name is Ahmed ibn Al Hassan ibn You Abi al Haggag Youssef ibn Umar ibn Yehia ibn Umar ibn 'Ardun known as Ibn 'Ardun.<sup>130</sup> He was born in Ghemara in Morocco He was promoted to be *Kadi al-Kudah* (Head of Judges).<sup>131</sup> He was an expert in genealogy, and written a book in this discipline called *al-La'eq fi 'ilm al-Watha'eq*. Also, his book *al-Moqni'* is a collection of articles in jurisprudence, tradition, parenting, medicine and history.<sup>132</sup>

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<sup>126</sup>ibid, p. 45

<sup>127</sup> Ibid.

<sup>128</sup> Abu al-Abbas Ahmed ibn al-Hussein ibn 'Ardun. Imam, jurist and fair judge. He was the student of al-Mangour, al-Junawi, al-Hamidy, al-Batioi, al-Serag. He wrote *al-La'eq fi 'ilm al-Watha'iq*. He is the nephew of Abi al-Kassem ibn Khiggo. He died in 992.

Source: Makhlūf, Muḥammad i. M. *Shajarat Al-nūr Al-zakīyah Fī ṭabaqāt Al-mālikīyah*. aDār al-Kitāb al-'Arabī, Bayrūt, 1930. P. 286

<sup>129</sup> Most of his fatwas are mentioned in *Nawazel Alsherif Al'elmy*.

<sup>130</sup> Al-Jaidi, Omar (1987), *Ibn 'Ardun al-Kabir: Hayatoh wa Atharuh: 'Ara'oh wa Fiqhoh*. 1<sup>st</sup> ed. Casablanca. Al-Nagah al-Gadida, Press, p.93

<sup>131</sup> Ibid, p. 118

<sup>132</sup>ibid, p. 140.

Sheikh al-Kassar described Ibn ‘Ardun as “*the rooted in knowledge*”.<sup>133</sup> Ibn Al Kadi (d. 1616) described him as “virtuous and wise”.<sup>134</sup> Ibn ‘Ardun was described by Sulayman al-Hawatt (d. 1816) in his book *al-Ansab*, as “the most knowledgeable and fairest judge.”<sup>135</sup>

*Ibn ‘Ardun’s Fatwa of the Equal Division of the Matrimonial Wealth:*<sup>136</sup>

Ibn ‘Ardun was interested in the welfare of the family in general. Therefore, he wrote *Mokna’ al-Muhtag Fi Adab al-Zawag*. It is important to note that Ibn ‘Ardun acknowledged women’s entitlement to their share in the development of the matrimonial wealth, centuries before the Western society formulated it into a law.

In Sous and Chefchaouen, where Ibn ‘Ardun settled, the ‘*urf* shaped the Bedouin women’s responsibilities ranged from tending to cattle, cultivation of land, harvesting the crops grinding it, assisting in building the houses, buying and selling of goods, mothering children and other household chores. Given these obligations, Ibn ‘Ardun added that, in case of divorce, ex-wives are entitled to half of the development of the matrimonial wealth, upon separation.<sup>137</sup> He based his argument on the product being due to the spouse’ combined labor, thus allocating half of the development of the matrimonial wealth to the wife is fair

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<sup>133</sup> Al-Jaidi, Omar (1987), *Ibn ‘Ardun al-Kabir: Hayatoh wa Atharuh: ‘Ara’oh wa Fiqhoh*. 1<sup>st</sup> ed. Casablanca. al-Nagah al-Gadida, Press, p. 141

Abu al-Hassan Ali ibn Ahmad al-Bughdadi known as Ibn al-Kassar. Maliki Jurist. He is specialized in the issue of Conflicts in Jurisprudence. Died in 398

Source: Makhlūf, Muhammad M. *Shajarat al-Nūr al-Zakīyah fī Ṭabaqāt al-Mālikīyah*. Dār al-Kitāb al-‘Arabī, Bayrūt, 1930, p. 92, entry: 208

<sup>134</sup> Ibid, p.141.

Muhammed al-Kadi al-Meknasi, jurist and judge. Tutor of al-Wansharishi. He is the author of *Majales al-Kudah wa al-Hukkam wa al-Tanbih wa al-A’lam*. Born in 835, and died in 917.

Source: Makhlūf, Muhammad. M. *Shajarat Al-nūr Al-zakīyah Fī tabaqāt Al-mālikīyah*. aDār al-Kitāb al-‘Arabī, Bayrūt, 1930, p. 275, entry: 1025

<sup>135</sup> Arabic text: أبو العباس أحمد بن عرضون أعلمهم و أعدل قضائهم, translation mine.

source: Ibid, p.139

Sulayman ibn Muhammed al-Hawwat, born in 1160. Died in 1816. Specialized in literature and history. Head of Ashraf Syndicate.

Source: <http://islamport.com>, accessed December 31<sup>st</sup>, 2017.

<sup>136</sup> The fatwa was mentioned in Nawazel al- ‘Elmy, Hasheyat al-Rahouny, al-Me’ayar al-Gadid (by Al-Wazzany), Tuhfat Akyas al-Nas, Al-Gawaher Al-Mokhtara (Abdel-Aziz Al-zayati)

<sup>137</sup> Al-Mazkaldi, Omar, 2005. *Haq al-Kadd wa al-Se’aya Muhawalah fī al-Ta’sil*. Master Thesis, Muhammed al-Khamis, p.84



according to ibn ‘Ardun. The fatwa was not found in the early jurisprudential works, however there is a comment about it by Abu-Zayed al-Fasi in *‘Amal Fez*, and it is mentioned in *Nawazel al-Almy* and *Hashiyat al-Rahouni*.<sup>138</sup> Also, al-Mahdi al-Wezzani mentioned it in his *al-Me’ayar al-Jadid* and *Tuhfat Akyas al-Nas*. Moreover, Ibn ‘Ardun’s fatwa stated that female widows are entitled to half the development of the matrimonial wealth, in addition to their share in inheritance.<sup>139</sup>

#### *Early court Records of al-Kadd wa al-Se’aya:*

Early Maliki *shari’a* court records from Fez in which Moroccan women litigated their right of *al-Kadd wa al-Se’aya* will be illustrated below. The significance of those court records is to show that judges in pre-modern Islamic societies, acknowledged this right as an inherent financial right to women in exchange to their labor.

Court Record Number 1: In 7<sup>th</sup> of July 1751, 13<sup>th</sup> of Sha’aban 1164

Sa’eed ibn Ahmed and Sa’eed ibn Abdullah witnessed that Fatma bint Muhammed ibn Ibrahim ibn Ali has received from her uncle Umar ibn Abdullah all the money the latter received from Musa ibn Ahmed (her ex-husband) that includes her maintenance, last installment of the dowry (*mo’akhar*), her bridal shower and the compensation of her efforts (*kaddha*), that she is entitled to from the deceased Miloud ibn Musa (husband). Accordingly, Fatma is entitled to thirty baskets of wheat and barley.<sup>140</sup>

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<sup>138</sup> Al-Jaidi, Omar (1987), Ibn ‘Ardun al-Kabir: Hayatoh wa Atharuh: ‘Ara’oh wa Fiqhoh. 1<sup>st</sup> ed. Casablanca. Al-Nagah al-Gadida, Press, p. 194 The Arabic text, translation, mine  
وخدمة النساء في البوادي للزوج بالدرس و الحصاد

قال ابن عرضون لهن قسمة على التساوي بحساب الخدمة  
لكن أهل فاس فيها خالفوا قالوا لهم في ذلك عرف يعرف

<sup>139</sup> ibid. p. 205

<sup>140</sup> Ibn ‘Abd al-Salam. A. 2010. *Mina al-Huquq al-Maliyya li al-Mar’a*. 2<sup>nd</sup> ed. Al-Ribat Dar al-Qalam. P. 226

Court Record Number 2: In 14<sup>th</sup> of July 1775, 15<sup>th</sup> of Jumada 1, 1189:

Upon the death of Mubarak ibn Musa, his wife Mariama bint Sa'eed ibn Ahmed and the deceased's sons divided the inheritance as follows: Mariama received her share of all the deceased's capital including; cattle, harvest and bees, as compensation of her labor (*kadd*), excluding slaves, house, and land. Sa'eed ibn Ahmed, her attorney received the money. <sup>141</sup>

Court Record Number 4: July 1778, Sha'aban 1192:

Abdeaziz ibn Musa ibn Ibrahim ibn Ali ibn al-Batatny has been separated from his wife who is the daughter of his brother in law Muhamed ibn Mawloud ibn Musa ibn Ahmed called Fatma bint Abdelaziz. They agreed that Fatma receives half of her late dowry payment, her bridal shower, and her *kadd* in harvesting and taking care of the cattle. Witnessed by Sa'eed ibn Abdullah, his son Ahmed, Ibrahim ibn Ali, Sheikh Muhammed ibn Masoud, Haj Mubarak ibn Abdullah and Haj Muhammed ibn Mubarak ibn Si. <sup>142</sup>

Court Record Number 3: March 1868, Duh al-Hajjah 1284:

The court record states that, "the free sane adult Fatma bnt Alhussein ibn Ali has gifted her daughter all her late dowry payment, her inheritance from her parent, and her *sa'ay* from her husband's and father's money, with the approval of her husband. This gift is totally based on goodwill, seeking God's approval". <sup>143</sup>This fatwa witnessed by Ibrahim ibn Umar ibn Ahmed ibn Muhammed al-Talay and Ali Sa'eed Mubarak Alyasny al-Edghazly. <sup>144</sup>

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<sup>141</sup> Ibn 'Abd al-Salam. A. 2010. *Mina al-Huquq al-Maliyya li al-Mar'a*. 2<sup>nd</sup> ed. Al-Ribat Dar al-Qalam, 234

<sup>142</sup> *ibid.* p. 246

<sup>143</sup> Ibn 'Abd al-Salam. A. 2010. *Mina al-Huquq al-Maliyya li al-Mar'a*. 2<sup>nd</sup> ed. Al-Ribat Dar al-Qalam, p. 236

<sup>144</sup> *ibid*

Court Record Number 5: 30<sup>th</sup> of April 1881, Jumada 1 1298

Mubairah bint Alhussein, the wife of Ahmed ibn Zaboub, has sold to Ibrahim ibn Ahmed ibn Muhammed all her *Kadd* in the land of Ahmed ibn Zaboub with the benefits of the *Kadd*. This is a correct sale, and she had received her money. This was written by Mubarak ibn Ahmed ibn Ibrahim ibn Yehia. <sup>145</sup>This court record shows that the right of *al-Kadd* was traded.

From the above mentioned court records, one can assume that the concept of financially rewarding women's labor in the household was known and accepted as a legitimate financial right, as well as being litigated and traded.

*Contemporary Scholars for and Against the Right of al-Kadd wa al-Se'aya:*

After going through the views and opinions of different medieval and pre-modern jurists regarding the right of *el-Kadd wa al-S'aya*, it is important to shed light on some of the opinions of contemporary Azhari Islamic jurisprudential scholars' opinions regarding this same right will be illustrated, in order to establish how the right of *al-Kadd wa al-Se'aya* can be embraced in Egyptian personal status law.<sup>146</sup>

Professor Amna Nosseir gave an opinion on the matter that is heavily based on the role of women in reality. She interprets that verse 32 in *Surat al-Nisaa'* refers to the entitlement of men and women to the financial rewards of their labor. Regarding women's entitlement to a share in the matrimonial wealth, Nosseir referred to an incident in the time of Umar ibn al-Khattab, when Amer ibn al-Hareth and his wife Habiba bint Zariq used to work together in sewing the clothes. <sup>147</sup> When the husband passed away, the deceased husband's relatives

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<sup>145</sup>Ibn 'Abd al-Salam. A. 2010. *Mina al-Huquq al-Maliyya li al-Mar'a*. 2<sup>nd</sup> ed. Al-Ribat Dar al-Qalam, p. 262

<sup>146</sup>Prof. Amna Nosseir, Professor of Comparative Jurisprudence, al-Azhar University. Member of Egyptian Parliament.

Dr. Amr el-Werdani, Holder of PhD in Islamic jurisprudence from al-Azhar.

Sheikha Mahnoud Awwad, Imam in Ministry of Awqaf. MA in Islamic Jurisprudence, al-Azhar University.

<sup>147</sup>sometimes is mentioned as Umar ibn al-Hareth

claimed their share of inheritance. Habiba went to Umar ibn al-Khattab asking for her share in the matrimonial wealth, before assigning inheritances. Umar ibn al-Khattab allocated half of the development in the matrimonial wealth to Habiba, in addition to one fourth of the second share, as her legal right of inheritance.<sup>148</sup> Nousseir's referred to an incident that was found it several times in the literature related to *al-Kadd wa al-Se'aya* and was attributed to al-Bukhari in his *Sahih* collection of tradition. However, attempts to allocate its discourse were unsuccessful. The incident were also stated in the debates of some of the pre-modern Muslim scholars in regards to the right of *al-Kadd wa al-Se'aya* as mentioned earlier.

Sheikh Mahmoud Awwad agreed on granting women their share of the matrimonial wealth as indicated by the right of *al-Kadd wa al-S'aya*, seeing as that he considered it as a matter of justice.<sup>149</sup> However, according to Awwad, the right to half the matrimonial wealth should be only granted to the wife who has financially contributed to the household during marriage.<sup>150</sup> Awwad based his conclusion regarding the right of *al-Kadd wa al-Se'aya*, on the notion that since both spouses provided their labor and time in the development of the matrimonial wealth, they should be treated as equal economic partners. He gave the example of reproduction, when both spouses have a role in the process, yet the offspring is not the sole property of either. However, Shiekh Awwad's argument is lacking the notion that household labor is a form of economic activity that can be monetized and financially compensated, thus there is no need to differentiate between working and non-working women in the entitlement to the share in the matrimonial wealth, different shares can be allocated though based on his opinion.<sup>151</sup>

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<sup>148</sup> The wife is entitled to one fourth her deceased husband's property, if they do not have children, which was the case with Amer and Habiba

<sup>149</sup> Awwad, Mahmoud. Personal Interview, 22<sup>nd</sup> of December, 2017

<sup>150</sup> *ibid*

<sup>151</sup> Please refer to chapter one.

As opposed to those two Azhari scholars who support the right of *al-Kadd wa al-Se'aya*, Dr. Amr el-Werdani, refuted the basis of this right from an Islamic jurisprudential perspective. El-Werdani differentiated between voluntary and non-voluntarily labor, as source of income and ownership. The former, according to el-Werdani, is not to be financially compensated. Women, according to al-Werdani, are fulfilling their domestic role as volunteers, thus they are not entitled to financial compensation.<sup>152</sup> El-Werdani does not acknowledge the literature that illustrates that spending more time to perform household chores and tend to children reduces the amount of leisure time available to women which they sacrifice in order to bring in more money into the household or perform household chores which constitutes a sacrifice that should be monetized and financially compensated.<sup>153</sup> To summarize, the evaluation of the soundness of right of *al-Kadd wa al-Se'aya* from an Islamic jurisprudential perspective might initiate a discussion amongst contemporary Muslim scholars. Thus, in the following section, some of the concerns regarding the legitimacy of the right of *al-Kadd wa al-Se'aya* will be analyzed, in attempt to have a clearer perception regarding the soundness of the right from an Islamic jurisprudential standpoint and to support having it translated into a law in the Egyptian personal status law.

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<sup>152</sup>El-Werdani, Amr. Personal Interview. 24<sup>th</sup> of December 2017

<sup>153</sup>Kimmel, Jean, and Rachel Connelly. "Mothers' Time Choices: Caregiving, Leisure, Home Production, and Paid Work." *Journal of Human Resources*, vol. XLII, no. 3, 2007, p. 673.

### *The Counter Arguments:*

Some concerns regarding the practicality of adopting the right of *al-Kadd wa al-Se'aya* in personal status law were raised by some scholars in Morocco when feminist's movements called for its application, as will be illustrated in the following chapter. Some of those concerns will be illustrated in the following section, in an attempt to rebuttal the inconvenience of including the right of *al-Kadd wa al-Se'aya* into the Egyptian personal status law.

Question number 1: Why allocate a share of the matrimonial wealth if the wife is entitled only to maintenance in case of divorce or inheritance in case of the death of her husband according to the Qur'anic text?

*Nafaqa* (Maintenance) and *mut'a* (compensation for separation) are financial rights granted to women when the marriage ends, for being a wife.<sup>154</sup> However, allocating a share for the wife in the matrimonial wealth is to acknowledge and monetize her labor in the household, that she is not requested to do however in reality she does, which makes her a legitimate economic partner. Nonetheless, justice entails that her efforts get acknowledged and compensated for, according to verse 32 in *Surat al-Nisaa'*.<sup>155</sup>

Furthermore, there is a difference between the right of *al-Kadd wa al-Se'aya* and the wife's share in inheritance. The former entitles her to a share in the assets formulated during marriage only, unlike the concept of inheritance which acknowledges the wife's right in all the deceased's assets, regardless of the time they were acquired.<sup>156</sup> In addition, in inheritance

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<sup>154</sup>Kimmel, Jean, and Rachel Connelly. "Mothers' Time Choices: Caregiving, Leisure, Home Production, and Paid Work." *Journal of Human Resources*, vol. XLII, no. 3, 2007, p. 673

<sup>155</sup>ibid

<sup>156</sup> Al-Mazkaldi, Omar, 2005. *Haq al-Kadd wa al-Se'aya Muhawalah fi al-Ta'sil*. Master Thesis, Muhammed al-Khamis, p.87

debts should be paid first, then the remaining wealth is to be divided among heirs. However in case of the husband's death, the wife should get her share of the matrimonial wealth before allocating inheritance shares, thus treating her share as an economic debt.<sup>157</sup> Thus, the right of *al-Kadd wa al-Se'aya* is a financial right granted to the wife who contributed labor and/or financial assistance that backed the development of the household's financial status. Hence, she should be acknowledged as an economic partner.

Question number 2: Is the right of *al-Kadd wa al-Se'aya* entitled equally to women in rural and urban areas?

Muslim scholars differentiated between the role of women in rural and urban areas, and accordingly differed on the type of women's labor that entitle them to a share in the matrimonial wealth. Some scholars agreed that in rural areas, women perform strenuous tasks, like cultivating and tending to cattle, that yield economic income, and thus it is easier to connect them to the development of the matrimonial wealth. Among the scholars who advocate this classification are, Muhamed ibn 'Ardun (d. 1603), Al Sheikh al-Kouri (d. 1467) and Abu al-Kassim ibn Kheggo (d. 1549).<sup>158</sup> Moreover, Abu Ishaq al-Tunsi (d. 1631) stated that the wife in rural areas shares the matrimonial wealth with her husband in proportion to the labor she performs. She is not to share her husband's personal property that he acquired via gifts or inheritance -unlike urban women- who are for sexual gratification only, according to al-Tunsi.<sup>159</sup>

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<sup>157</sup> Al-Mazkaldi, Omar, 2005. *Haq al-Kadd wa al-Se'aya Muhawalat fi al-Ta'sil*. Master Thesis, Muhammed Al-Khamis, p.88

<sup>158</sup> Muhammed ibn al-Hussein ibn 'Ardun. A Maliki judge. Author of *Sharh 'ala 'Akidat al-Senoussi*. Died in 1604.

Source: Makhluḥ, Muhammad i. M. *Shajarat Al-nūr Al-zakīyah Fī tabaqāt Al-mālikīyah*. aDār al-Kitāb al-'Arabī, Bayrūt, 1930, p. 295, entry: 1134

<sup>159</sup> Translation, mine. Arabic text; "أن الزوجة في البادية تشارك زوجها على قدر سعياتها و لا يستبد الزوج بما عقد على نفسه من الأثرية و لا بما جهز به ان كان ذلك من ماله الخاص له من صدقة عليه أو هبة أو نحو ذلك و الاخوة كذلك و نساء الحاضرة بخلاف ذلك لأنهن للفرش"

On the other hand, other Muslim scholars disagree with the previous inference and believe that all women are entitled to a share in the matrimonial wealth, as does Ibn al- Attar (d. 1324), because, as he stated, legal principles are universally applied to all women, with no exceptions. Al-Attar gave the example of urban woman working in yarn and textile with her husband, and added that the wife is a partner with her husband in the value of the products they produce.<sup>160</sup>

To conclude, the right of *al-Kadd wa al-Se'aya* is an inherent right for women from the first day of marriage in exchange for their labor in the development of the matrimonial wealth regardless of their location. The following section will shed the light on the Islamic jurisprudential concepts from which the right of *al-Kadd wa al-Se'aya* can be derived from. Investigating its jurisprudential soundness, will help the legal community to translate it into a law. There are many jurisprudential concepts that can be used today to articulate the right of *al-Kadd wa al-Se'aya*. Those include, Implied Hiring (*Ijara*), Enrichment without reason, *Abdan* Partnership, *Jabr* partnership, and Repudiation of Damage. These concepts will be dealt with in the following section individually with their description and illustration of how they can be used to articulate the right of *al-Kadd wa al-Se'aya*.

#### *Islamic Jurisprudential Concepts that Accommodate the Right of al-Kadd wa al-Se'aya:*

It can be debated that the right of *al-Kadd wa al-Se'aya* was incorporated in the Moroccan, Indonesian and Malaysian personal status law based on their '*urf*', as will be illustrated in the following chapter. However, even in societies that do not have this concept imbedded in their '*urf*', there are many Islamic Jurisprudential concepts that can be referred to today in articulating the right of *al-Kadd wa al-Se'aya* from an Islamic jurisprudential perspective, as

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<sup>160</sup> Al-Mazkaldi, Omar, 2005. *Haq al-Kadd wa al-Se'aya Muhawalat fi al-Ta'sil*. Master Thesis, Muhammed al-Khamis, p.177



shown below to enable legal personnel in these countries to translate this financial right into their personal status law.

*Implied Hiring (Ijara):*

According to jurists, *Ijara* occurs when someone is providing a utility for another in exchange for being financially compensated.<sup>161</sup> Utility can also take the form of labor.<sup>162</sup> Thus, women in the household, who according to *‘urf*, perform certain tasks are eligible to be considered as a hired employee in an implied *ijara* relation. Thus the husband will be the boss and the wife (or any member in the family who contributes in developing the matrimonial wealth) will be subordinate.<sup>163</sup> To extend the jurisprudential concept of *ijara* to the marital relation assumes this kind of relationship is implied implicitly in the marriage contract - “implied *ijara*”. A man marries a woman expecting her to do household chores and take care of the children but rather than paying her a wage, this unpaid wage is hence converted into a share in the development of the matrimonial wealth.

Those who disagree with the preceding argument may argue that it is inappropriate to treat the wife as an employee working for the husband.<sup>164</sup> Moreover, this will convert that nature of the marriage contract to be similar to a labor contract.<sup>165</sup> In addition, if the concept of the right of *al-Kadd wa al-Se’aya* was based on *ijara*, it means that the wife is entitled to a wage regardless whether the value of the matrimonial wealth increased from the day of consummating the marriage or not, which contradicts the notion that she is an equal

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<sup>161</sup>Egypt. Majlis al-A‘lá lil-Shu‘ún al-Islāmīyah. *Mawsū‘at Al-Fiqh Al-Islāmī*. al-Majlis al-A‘lá lil-Shu‘ún al-Islāmīyah, Cairo, 2013. P. 199

<sup>162</sup> Ibid, p. 200

<sup>163</sup> Ibid, p.131

<sup>164</sup> Ibid, p.141

<sup>165</sup> Ibid

economic partner in the marriage institution.<sup>166</sup> Furthermore, implying that the wife is a subordinate to the husband contradicts with her being an equal partner in marriage.

*Sharikat al-Jabr (Jabr Partnership):*

Partnership as defined in Islamic jurisprudence as the merging of two shares.<sup>167</sup> According to Gomaa, *Sharikat al-Jabr* is a form of partnership in which a buyer of a product is obligated to share the purchased product with a partner.<sup>168</sup> It occurs when two parties agree to pool together their money, and use collectively it in an economic activity with an agreement to share the profit and losses.<sup>169</sup> It is important to note that according to Islamic jurisprudence, in this type of partnership, none of the partners are allowed to trade shared capital without the consent of the other partner.<sup>170</sup> Each partner is required to do what is in the best interest of the other partner. It is important to note that the Maliki School of jurisprudence did not condition having a written consent in advance as a prerequisite for the *Sharikat al-Jabr* partnership to be legitimate.<sup>171</sup>

Commonalities between *Sharikat al-Jabr* partnership and marriage include that both parties pool their money and efforts together in seeking the development of the household and the matrimonial wealth. Thus, the profit yielded from this partnership (the development in the matrimonial wealth) is thus to be shared between both partners, i.e. acknowledging that women are entitled to their right of *al-Kadd wa al-Se'aya*, especially in case if the wife contributes financially to the household. Thus, this jurisprudential concept can be referred to when attempting to call for the right of *al-Kadd wa al-Se'aya* to be incorporated into the

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<sup>166</sup> Ibid

<sup>167</sup> Al-sharikah. (1983). In: *Al-mawso'a Al-fiqheyyah*, 2nd ed. Kuwait: Kuwaiti Ministry of Awqaf and Islamic Affairs, pp.chapter 26, p. 20

<sup>168</sup> Jum'ah, 'Alī, et al. *Mawsū'at fatāwā Al-mu'āmalāt Al-mālīyah Lil-maṣārīf Wa-Al-mu'assasāt Al-mālīyah Al-Islāmīyah*. vol. qism 2.; qism 1.;qism 2-;qism 1-; Dār al-Salām, al-Qāhirah, 2009, volume 3 p. 2

<sup>169</sup> Ibid.

<sup>170</sup> Sharikah al-Abdan,. (1983). In: *Al-mawso'a Al-fiqheyyah*, 2nd ed. Kuwait: Kuwaiti Ministry of Awqaf and Islamic Affairs, Chapter 26, p. 23

<sup>171</sup> Ibid, p.231

Egyptian personal status law, as it translates the majority of the modern Egyptian family models.

*Sharikat al-Abdan* (Abdan Partnership):

Another form of partnership in Islamic jurisprudence and refer to the right of *al-Kadd wa al-Se'aya*, is *Sharikat al-Abdan* which is a form of partnership in which a partner offers his/her labor and the other partner offers capital.<sup>172</sup> As will be illustrated in the following chapter, this jurisprudential concept was referred to in Indonesia to express the entitlement of women in the matrimonial wealth. In this case, one may assume that the husband who is responsible for the household maintenance, provides capital (money) while the wife who is required by *'urf* to perform household chores, provides labor. A *fatwa* demonstrating how *Sharikat al-Abdan* can be used in explaining the right of *al-Kadd wa al-Se'aya* is as follows:

In Fatwa no. 1799/6, the Fatwa Council in Kuwait (1799):

Question: A son is working with his father in the family business, should he get a greater allocation in the inheritance more than his siblings who are not working in the family business?

The answer: "*He is entitled to a share in the profit of the family business, in addition to his share in inheritance*".<sup>173</sup> In this case, the son did not have an initial capital; the father did. The son provided labor that led to an increase in the value of the initial capital. The fatwa came to state that the son has a legitimate share in the profit of his father's wealth in addition to his share of inheritance of the same wealth. The fatwa can be extended to the right of *al-Kadd wa al-Se'aya* to the wife. If the wife did not contribute to the initial capital of the household, but she provided labor, that contributed to the development of the matrimonial

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<sup>172</sup>Jum'ah, 'Alī, et al. *Mawsū'at Fatāwā al-Mu'āmalāt al-Mālīyah Lil-Maṣārīf Wa-Al-Mu'assasāt al-Mālīyah Al-Islāmīyah*. , Dār al-Salām, al-Qāhirah, 2009, volume 3 p. 55

<sup>173</sup>ibid, p. 180-181

wealth, then according to this fatwa and based on *Sharikat al-Abdan* jurisprudence concept, the wife is entitled to her share in the matrimonial wealth, without affecting her share of inheritance.

*Ithra'a Billa Sabbab* (Enrichment without Reason):

*Ithra'a billa sabbab* is defined as someone acting on the behalf of someone else seeking the latter's benefit.<sup>174</sup> This action entails that the latter owes the former financial right, which compensates the former's effort, money and time the former exerted. However, jurists condition that the actor who acted on the behalf of the other should not be doing this as a volunteer.<sup>175</sup> If someone acted on behalf of someone else voluntarily, then he/she should not be financially compensated. It is stated in the Egyptian law that, "*when someone acts on behalf of another for the latter's benefit without being obliged to do so, he/she should be rewarded*".<sup>176</sup> The law adds a condition that there should be a need for this action and urgency, that had not the former acted, there would be risk imposed on the latter.<sup>177</sup> To extend this concept on the marital relation, if the wife decided that she will not perform the household chores, then the household will be at risk.<sup>178</sup>

If the concept of *Ithraa' Bila Sabb* was extended to the role of the wife in the development of the matrimonial wealth, one may find commonalities between the jurisprudential concept and the marital relation. Since, the wife is acting on behalf of her husband/family, doing what is in their best interest, thus the jurisprudential concept of *Ithra'a billa sabbab* is applicable to the wife's role in the household, and hence she should be financially compensated to a share of the wealth she contributed in its development. However, women should be aware

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<sup>174</sup>Murqus, Sulaymān. *Muhāḍarāt fī al-Ithra'* 'Alā Hsāb al-Ghayr fī Taqnīnāt al-Bilād al-'Arabīyah. Jāmi'at al-Duwal al-'Arabīyah, Ma'had al-Dirāsāt al-'Arabīyah al-'Āliyah, al-Qāhirah, 1961, p. 26

<sup>175</sup> Ibid, p. 22

<sup>176</sup> Ibid, p. 36

Law no. 144/205, 145/206 till 148/209 and law article 179-197

<sup>178</sup> Ibid, p. 40

that they are doing a role that is not imposed upon them, i.e. they are not volunteers, as to be entitled to financial compensation.<sup>179</sup>

*Jabr al-Darrar* (Repudiation of Damage):

Another applicable Islamic jurisprudential concept to the right of *al-Kadd wa al-Se'aya* is *Jabr Al-darrar* (Repudiation of Damage). It is when someone inflicts damage on another, a judge estimates the financial value of the damage, and requires the perpetrator to pay it to the one who suffered. Extending the concept of *Jabrr al-Darrar* to the marital relations, the judge will put a monetary value to all the financial expenses that the wife incurred and all the labor she exerted in the household that contributed to the development of the matrimonial wealth, and require the husband to pay it to her.<sup>180</sup> Damages are not only monetary; one can consider all the time and labor a wife allocated to the household as an opportunity lost, that she could have allocated towards her career, meaning that the wife is adversely affected by her role in the household, hence there is a damage that should be repudiated.

Although, Dr. Amr el-Werdani does not approve of incorporating the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law, he believes that women should be financially compensated for any damage that she incurred in the marriage.<sup>181</sup> He also stated that if a woman contributed financially to the household, she should be financially compensated, because she is not obligated to do so. However, using the Islamic jurisprudential concept of *Jabr al-Darrar* as a basis of the right of *al-Kadd wa al-Se'aya* does not situate the wife in a partnership position with her husband in the marriage institution. To sum up, although there are concerns that were raised regarding the alignment of the right of *al-Kadd wa al-Se'aya* with Islamic jurisprudence, there are some Islamic jurisprudential

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<sup>179</sup> Please refer to the section of Jurisprudence opinion regarding the role of the woman in the household.

<sup>180</sup> This is based on Islamic *shari'a* that entails that household maintenance is solely the husband's responsibility, and the wife is not required to contribute to it.

<sup>181</sup> El-Werdani, Amr. Personal interview. 24<sup>th</sup> of December, 2017

concepts through which it can be derived, such as *Ijara*, *Ithraa Bila Sabb*, *Sharikat al-Jabr*, *Sharikat-al-Abdan* and *Jabrr al-Darrar*. Hence, this right can be incorporated in the Egyptian personal status law which main source is Islamic jurisprudence.

#### *Conclusion:*

It is evident that the right of *al-Kadd wa al-Se'aya* has a solid basis in the Islamic jurisprudence that dates back to pre-modern times. The right of *al-Kadd wa al-Se'aya* was acknowledged and debated by early jurists, litigated by pre-modern women in *shari'a* courts, and quantified by a pre-modern Muslim scholar, and granted to women in addition to their share of inheritance. The key point is that there are many concepts in Islamic jurisprudence that can be referred to in expressing the right of *al-Kadd wa al-Se'aya*. As Sholkamy indicated, jurisprudence set many frameworks in which the marital relation exists depending on the interpretations of the text, and Islamic jurisprudential should be responsive to changes in the society as they unfold.<sup>182</sup> Leaning towards more egalitarian interpretation of the Qur'anic text and translating it rationally into some Islamic jurisprudential guidelines is the role of the religious clergy, and depends on their willingness to react to the changing dynamics, through *ijtihad*, to abolish injustices borne on women in the marriage institution. This willingness was present in the religious clergy of Morocco, Indonesia and Malaysia as will be shown next.

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### **Chapter Three: The Right of *al-Kadd wa al-Se'aya* in the Legal Systems of Morocco, Indonesia and Malaysia and its Application**

The right of *al-Kadd wa al-Se'aya* has been implemented in several contemporary *Shari'a* based legal contexts. This chapter attempts to illustrate how three Muslim countries acknowledged and estimated women's labor in the household in their personal status laws. These countries are Morocco, Indonesia and Malaysia which often refer to the Qur'anic text in formulating their personal status laws. Morocco's population is 99% Muslims.<sup>183</sup> 87.2% of the population of Indonesia are Muslims.<sup>184</sup> Also, 61.3% of the population of Malaysia are Muslims.<sup>185</sup> Morocco follows the Maliki School of jurisprudence in formulating their personal status laws, while both Malaysia and Indonesia follow the Shaffi'i School of jurisprudence. Each country's personal status law's process of development will be discussed separately. The chapter will primarily investigate the history of their personal status laws, with special attention to the amendments that incorporated the right of *al-Kadd wa al-Se'aya* in them. Furthermore, it will aim to illustrate that incorporating the right of *al-Kadd wa al-Se'aya* could be promulgated into law, which will showcase the right as a legal concept that could be incorporated into the personal status laws of Egypt, as will be discussed in chapter four.

Personal status laws in Muslim nations are derived from the interpretations of the Qur'anic text and Islamic jurisprudence. However, the call for the modification of the law and the reinterpretation of the Qur'anic text arises when there is social need and political will. According to Buehler, there is a rising debate that relates the *shari'a*-based personal status

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<sup>183</sup>[https://www.indexmundi.com/morocco/demographics\\_profile.html](https://www.indexmundi.com/morocco/demographics_profile.html), accessed 24/12/2017

<sup>184</sup>[www.pewforum.com](http://www.pewforum.com), accessed 12<sup>th</sup> of December, 2017.

<sup>185</sup>[www.itc.gov.my](http://www.itc.gov.my), accessed 12<sup>th</sup> of December, 2017

law and the desire by the state to cause social change and to serve the state's agenda.<sup>186</sup> Buehler recalls as an example, when Indonesia referred to the *shari'a* law to root its legitimacy and control over religious discourse.<sup>187</sup> Another example is when the Moroccan's government, wanted to appeal to the Western leaders through making several attempts to reform Moroccan personal status law that sought out an egalitarian status for women.<sup>188</sup> The first attempt was in 1957, by King Mohammed V, when he asked for a legal reform seeking more empowerment for women through stressing a more liberal interpretation of Qur'anic text, as will be illustrated below.<sup>189</sup>

### *Section One: Morocco*

Morocco became independent from the French occupation in 1956. Following its independence, there was a call to have a codified personal status laws derived from Qur'anic text and Islamic jurisprudence. Moroccan personal status law was codified in the *Mudawwana* (code of laws) in 1957-1958.<sup>190</sup> There were attempts in 1993 and in 1999-2003 to modify the *Mudawwana* (Moroccan personal status law) improving women's social and financial statuses. In 1981, a commission was formed to amend the existing *Mudawanna* as there was international pressure to promote women's rights in Morocco.<sup>191</sup> King Hassan II was in a dilemma trying to appeal to the international society as a reformer with the willingness to initiate a fight with the traditionalists in the Moroccan community. In 1992, feminist NGOs gathered a million signatures requesting more amendments in the personal

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<sup>186</sup> Law as a tool of social engineering versus law as a response. The latter argument states that people call for changes in the *shari'a* based personal status law, meaning that it is not a political tool controlled by the state

<sup>187</sup> *ibid*

<sup>188</sup> Zoglin, Katie. "Morocco's Family Code: Improving Equality for Women." *Human Rights Quarterly*, vol. 31, no. 4, 2009, p. 965.

<sup>189</sup> *Ibid*, p. 966

<sup>190</sup> The *Mudawanna* was based on the Maliki School of jurisprudence

Source: Buskens, Léon. "Recent Debates on Personal status law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society*, vol. 10, no. 1, 2003, P. 70

<sup>191</sup> *ibid* p. 78



status laws.<sup>192</sup> The King formulated a commission that included feminists' organizations' representatives and requested its members to draft the new personal status laws.<sup>193</sup> Thus, the *Mudawanna* was updated in 1993 to include some reforms including allowing women to conclude marriages.<sup>194</sup> In 1999, another proposal was submitted by the government to the parliament aiming at the women's integration in the Moroccan society as a reaction to the United Nations declaration in the Women's Rights Conference in Beijing in 1995.<sup>195</sup> The proposal included an amendment to the personal status laws that included the right of sharing the matrimonial wealth among spouses.<sup>196</sup> The proposal also indicated that the judges were obligated to divide equally the property acquired during marriage between the spouses upon divorce.<sup>197</sup> It further added that whether the ex-wife is among the labor force or not, her contribution in elevating the status of the household is to be financially compensated as stated in Article 9 in the proposal:

*"After divorce, the joint matrimonial wealth to be divided equally to illustrate the concept of justice in Islam, and to acknowledge wife's sacrifices during that marital life. The judge who accords divorce should compensate the wife, because she contributed in developing either by her labor in the household, or financial contribution from her job."*<sup>198</sup>

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<sup>192</sup> Buskens, Léon. "Recent Debates on Personal status law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society*, vol. 10, no. 1, 2003, p. 78

<sup>193</sup> *ibid*, p. 80

<sup>194</sup> *ibid*, p. 80

<sup>195</sup> Buskens, Léon. "Recent Debates on Personal status law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society*, vol. 10, no. 1, 2003, p. 80

Bejin Declaration and Platform for Action: a plan to promote the status of women signed by more than 100 countries committing their governments to improve women's status.

Source: "Women's Conference Adopts 'Beijing Declaration and Platform for Action.'" (Breaking New Ground. Fourth World Conference on Women)." *UN Chronicle*, vol. 32, no. 4, 1995, p. 29

<sup>196</sup> *Ibid*, p. 85

<sup>197</sup> *ibid*, p. 86

<sup>198</sup> Ibn 'Abd al-Salām, a. (2010). *Mina al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāṭ: Dār al-Qalam p. 10 (footnotes)

The 1999 amendments thus acknowledged that wives' labor in the household should be financially compensated by allocating a share of the matrimonial wealth to them. In 2000, the Islamist political party (*Hizb al-'Adala wa'l-Tanmiya*) opposed the reforms in the personal status law stating that only the *ulama* (scholars) are allowed to do *ijtihad* and that the *Mudawanna* contradicts the Quran and the Sunnah.<sup>199</sup> They united with other Islamists' movements and made a manifesto condemning the proposal of 1999. On the other hand, reformists argued that justice and equality concepts are an integral part of Islam and called for a new interpretation of the Qur'anic text to eliminate gender inequality through *ijtihad*.<sup>200</sup> There was a tension between the traditionalists and reformists that was accentuated in a march, organized by the reformist in 2000, which called for more reforms in the personal status law.<sup>201</sup> Similarly, a protest was organized by the traditionalists in Casablanca, which called for not "westernizing" the Moroccan personal status laws.<sup>202</sup> Both groups wrote a memorandum to the King who sided with the reformists and added that personal status laws should adopt the rules of the UN Committee on the Elimination of Discrimination against Women (CEDAW) as long as they do not contradict the Islamic *shari'a*.<sup>203</sup> Eight Feminist NGOs drafted a family code that requested that the wife receives half of the matrimonial

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<sup>199</sup>Buskens, Léon. "Recent Debates on Personal status law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society*, vol. 10, no. 1, 2003, p. 94

<sup>200</sup> Article 400, of the Family blog, [www.hrea.org](http://www.hrea.org), accessed on 10<sup>th</sup> of December 2017.

<sup>201</sup>Buskens, Léon. "Recent Debates on Personal status law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society*, vol. 10, no. 1, 2003, p. 103

<sup>202</sup>*ibid*, p. 104

<sup>203</sup>*ibid*, p. 109

The Rules of CEDAW:

1. "Human rights protection is not only about refraining from doing harm, or negative obligations on the part of the state, but also about positive obligations to realize equality and the enjoyment of rights.
- 2 Obligations on the part of the state extend to inhibiting private actors from interfering with rights, actors such as husbands, partners, or employers.

3 International human rights protection requires relief from facially-neutral laws"

Source: Bayefsky, Anne F., et al. "The CEDAW Convention: It's Contribution Today." *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 94, 2000, JSTOR

wealth upon divorce.<sup>204</sup> In 2001, King Muhammed VI created the Consultative Commission Entrusted with the Reforms to the *Mudawwana*. The members were composed of the feminist NGO representatives, Muslim *Ulama* (Scholars), members of the judiciary and human rights representatives.<sup>205</sup> The commission conducted many interviews with civil society, political parties' representatives, and members of women's rights associations.<sup>206</sup> The committee referred to the international human rights' code and Islamic jurisprudence in their proposed amendments to the *Mudwanna* that were adopted in 2004.<sup>207</sup>

The *Mudawana* introduced the concept of partnership between husband and wife by legally forcing the equal division of matrimonial wealth upon divorce. It also set new conditions for the marriage to be legally accepted such as allowing women to marry themselves without a *walli* (guardian) and that divorce must be conducted by a judge.<sup>208</sup> Article 49 dealt with matrimonial wealth as follows:<sup>209</sup>

- 1- Each spouse is entitled to his/her own financial assets, acquired before marriage or given to him/her in a form of a gift or a donation.
- 2- Spouses can have a written agreement on how to divide, manage and develop the matrimonial wealth (For any asset that's value exceeds 250 Dirhams).<sup>210</sup>
- 3- In case there was no written agreement, the division of the matrimonial wealth should be based on the contribution of each spouse in its development and formulation.

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<sup>204</sup>Mir-Hosseini, Ziba, et al. *Gender and Equality in Muslim Personal status law: Justice and Ethics in the Islamic Legal Tradition*. I.B.Tauris, New York;London, 2013. P. 104

<sup>205</sup>Buskens, Léon. "Recent Debates on Personal status law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere." *Islamic Law and Society*, vol. 10, no. 1, 2003, p. 115

<sup>206</sup>ibid

<sup>207</sup>Zoglin, Katie. "Morocco's Family Code: Improving Equality for Women." *Human Rights Quarterly*, vol. 31, no. 4, 2009, p. 969

<sup>208</sup> Ibid, p. 971

<sup>209</sup>Ibn 'Abd al-Salām, a. (2010). *Min al-ḥuqūq al-māliyya li-al-mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam p. 11

<sup>210</sup>Mir-Hosseini, Ziba, et al. *Gender and Equality in Muslim Personal status law: Justice and Ethics in the Islamic Legal Tradition*. I.B.Tauris, New York;London, 2013. P. 97

It is evident from article 49 in the *Mudawanna* that the Moroccan legal body was aware of the importance of the financial compensation of spouses for their labor in the household while at the same time protecting each spouse's financial identity. Additionally, according to Article 49 of the *Mudawanna*, the judge should take into consideration the following points in allocating the shares of the matrimonial wealth:

- 1- The job of each spouse;
- 2- Efforts performed by each spouse for the development of the matrimonial wealth;
- 3- And the responsibilities borne on each spouse in the development of the matrimonial wealth.<sup>211</sup>

However, feminist activists are still concerned in regards to Article 49 because it puts a lot of restrictions on how to assess the wife's contribution to the marital wealth, as opposed to Muslim *Qadis* (judges) in pre-modern Moroccan *Shari'a* courts where the *Qadi* would only request the wife to take an oath to prove that she contributed to the household's financials, given that the wife is sane, mature and not forced by other party to take the oath.<sup>212</sup>

#### *The Division of the Matrimonial Wealth in Moroccan Contemporary Court Records*

In this section, a Moroccan family court record will be referred to in order to illustrate how the Moroccan legal system incorporated the right of *al-Kadd wa al-Se'aya* in its personal status laws.

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<sup>211</sup> Ibn 'Abd al-Salām, a. (2010). *Mina al-Huqūq al-Māliyya li-al-Mar'a*. 2nd ed. al-Ribāt: Dār al-Qalam p. 43 and <https://www.al-islam.org/>, the Rules of the Oath, accessed 17<sup>th</sup> of March 2018.

<sup>212</sup> Mir-Hosseini, Ziba, et al. *Gender and Equality in Muslim Personal status law: Justice and Ethics in the Islamic Legal Tradition*. I.B.Tauris, New York; London, 2013. P. 99

Rabat-Court record no. 579, in 2006:

An ex-wife asked for her right in the matrimonial wealth.<sup>213</sup> She claimed that she is entitled to half the harvest, cattle, furniture and houses owned by her ex-husband, in exchange to her *al-Kadd wa al-Se'aya* in the household, farming and tending to the cattle that she performed. The court decided that she is entitled to 21,000 Dirhams in exchange to her *se'aya*.<sup>214</sup> The court record does not specify the percentage of the matrimonial wealth the wife is entitled to in this case, only a figure was stated. It did not state the manner in which the court estimated the wife's contribution to the matrimonial wealth. However, the court did acknowledge that in this case the wife is entitled to a share in the matrimonial wealth in exchange to her labor that caused its development.

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<sup>213</sup> Ibn Abdel Salam, A. (2010). *Mina al-Huqouq al-Maliyyah li al Mar'a*. 3rd ed. Rabat: Dar al-Qalam, p. 58

<sup>214</sup> *ibid*, p. 59

## *Section Two: Indonesia*

Indonesia gained its independence in 1945 and abandoned the Dutch law it had previously adopted in its legislative system.<sup>215</sup> National law was derived from *urf*, the Qur'an, and Islamic Jurisprudence.<sup>216</sup> *Urf* was considered as a source of legal codes because according to Islamic jurisprudence, "what is traditionally known/accepted is like what is laid out as a condition in a contract."<sup>217</sup> However, the elements in the constitution based on *urf* were regarded by reformists as an obstacle for development then as they believed that it was an element of division between different factions of the Indonesian community.<sup>218</sup> Since there were nineteen ethnic groups in Indonesia, the courts had to accommodate to each ethnic group's *urf*.<sup>219</sup> Thus, there was a call by the reformists to have a unified code of laws that was answered by the Indonesian Supreme court in the period between 1950's-1960's.<sup>220</sup> In that period, according to al-Naim, the National Institute for Law Reform called for reforms in personal status laws.<sup>221</sup>

### *Division of Matrimonial Wealth in Indonesian Personal Status Law:*

Before adopting a codified personal status laws, the issue of sharing the matrimonial wealth was raised by *Nahdatul Ulama* in 1926 that stated that dividing the matrimonial wealth does not contradict either the Qur'anic text or Islamic jurisprudence.<sup>222</sup> It based its *fatwa* on the perception of marriage as an economic partnership wherein two partners share the proceedings of it. Furthermore, the Indonesian Muslim scholar Ahmed Hassan (d.1958) added that "*Marriage is a form of Shirakat Abdan*", since marriage conform to its criteria set

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<sup>215</sup>Cammack, Mark E. "Matrimonial wealth in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, p. 1445

<sup>216</sup>*ibid*, p.1446

<sup>217</sup> *ibid*, p. 179

<sup>218</sup>*ibid*

<sup>219</sup> *urf*, is defined as local customs, what people in a society perceive as normal.

<sup>220</sup>*ibid*

<sup>221</sup>*ibid*

<sup>222</sup>*Nahdatul Ulama*, which is the institution that issues Islamic *fatwas* (jurist opinion) in Indonesia

in Islamic jurisprudence, thus matrimonial wealth can be shared by spouses.<sup>223</sup> However, according to *Nahdatul Ulama*, if the proceedings of a certain spouse can be accurately economically calculated, then he /she should get his/her share of the matrimonial wealth without sharing it with the other spouse.<sup>224</sup>

When a set of codified laws were being adopted, the issue of sharing the matrimonial wealth was raised again. In 1956, the Supreme Court “*rejected the argument that the spouse who does not contribute financially to the household is not entitled to a share in the matrimonial wealth.*”<sup>225</sup> The Indonesian Supreme Court based their decision on the Javanese ‘*urf*’ that all properties acquired during marriage are considered shared properties, even if they were the product of the labor of one of the spouses.<sup>226</sup> It added, “*Indonesian Islamic tribunals have applied a doctrine of joint matrimonial wealth for more than 100 years.*”<sup>227</sup> According to Cammack, the Javanese culture regarded marriage as an economic partnership because women’s role in the household was regarded as an economic activity in the Javanese culture.<sup>228</sup> As according to Javanese ‘*urf*’, women participate heavily in the agriculture sector

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<sup>223</sup> Ahmed Hassan is one of the authors of *Soal-Jawal: Tentang berbagai Masalah Agama* volume 1 and 2. He died in 1958. Please refer to Chapter 2

Source: Cammack, Mark E. "Matrimonial wealth in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, 1450

<sup>224</sup> The *Gono Gini* concept was incorporated in the Indonesian Personal status law by the effort of *Nahdatul Ulama*, which is the institution that issues Islamic *fatwas* (jurist opinion) in Indonesia. It states that spouses should share equally the matrimonial wealth in case of divorce. It is driven from Indonesian ‘*urf*’ source: *ibid* p. 1451

<sup>225</sup> Matrimonial wealth according to the Indonesian law refers to all property gained during the duration of marriage either by the sole efforts of each spouse or their joint efforts. Matrimonial wealth excludes property gained by each spouse prior to signing the marriage contract. Source: Cammack, Mark E. "Matrimonial wealth in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review*, vol. 64, no. 4, 2007. 1447.

<sup>226</sup> Javanese Ethnic group is the biggest ethnic group and the most political influential in Indonesia source: *ibid*

<sup>227</sup> *ibid*, p. 1418

<sup>228</sup> Cammack, Mark E. "Matrimonial Wealth in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, p. 1443

and manage the household income, thus they are entitled to a share in the matrimonial wealth.

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In 1959, the Indonesian Supreme Court added that given the greater role of women in the Indonesian economy and her important role in the household, the matrimonial wealth should be divided equally among spouses in case of divorce, unlike before 1959 when the husband used to receive two third of the matrimonial wealth.<sup>230</sup> The Indonesian personal status law adopted equal division of matrimonial wealth between spouses as seen below:

*“All property acquired during the marriage qualifies as matrimonial wealth regardless of which party earned it, and irrespective over his or her separate property after marriage, and property acquired during the marriage as a result of inheritance or gift is the separate property of the recipient. Neither the husband nor the wife may sell or transfer matrimonial wealth without the consent of the other spouse. When marriage ends, by death or divorce, equal division of matrimonial wealth should be adopted.”*<sup>231</sup>

As shown from the articulation of the law, the provider of the initial capital in the matrimonial wealth is irrelevant. Both spouses are not allowed to trade the matrimonial wealth without the consent of the other. In 1960, the *Nahdatul Ulama* stated that if the husband died, the deceased wealth should be divided equally among the deceased heirs and his widow (meaning that the widow will receive half the inheritance) excluding her share as

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<sup>229</sup>ibid, p. 1446

<sup>230</sup>Cammack, Mark E. "Matrimonial Wealth in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, p. 1457

<sup>231</sup>Ibid, p. 1458



an heir.<sup>232</sup> Furthermore, according to Cammack, in all legal cases in which wives requested their shares in matrimonial wealth to equal to that of men, their requests were granted.<sup>233</sup>

*The Division of the Matrimonial Wealth in Indonesian Contemporary Court Records*<sup>234</sup>

*Court Case no.1: City of Jayapura in 1999:*

In the following case, it is evident that the *Gono Gini's* concept is adopted equally for both spouses. If a matrimonial wealth was developed with the initial capital funded by the wife (not the husband in this case), it will still be divided equally among them as shown.

The husband Tabi bin Rua purchased a truck using Supinah bint Sutikno's money (the wife). The truck was considered among the matrimonial wealth and its value was divided equally among the spouses upon divorce.<sup>235</sup>

*Court case no.2:*

The wife bought a land and a house for marriage. The husband later wanted a divorce because the wife was always teasing him for being socially inferior. They had an agreement that the husband can use the matrimonial wealth during marriage but he would have no right to share the matrimonial wealth in case of divorce. The wife urged the court to refer to this agreement when dividing the matrimonial wealth. The court refused because "*it was inconsistent with Islamic Law*" seeing as that the Prophet said "*Muslims are bound by their agreements, except for those that permit that which is forbidden or forbid that which is permitted.*"<sup>236</sup> Although there was an agreement that they will not share the matrimonial wealth upon divorce, the Indonesian law saw that it was inconsistent with the Islamic

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<sup>232</sup>Cammack, Mark E. "Matrimonial Wealth in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, p. 1457

<sup>233</sup>ibid, p 1458

<sup>234</sup>Primary sources of court records are kept in the Indonesian language, therefore the study referred to secondary sources.

<sup>235</sup>Bearman, P. J., et al. *The Law Applied: Contextualizing the Islamic Shari'a: A Volume in Honor of Frank E. Vogel*. I.B. Tauris, New York; London; 2008, p. 107

<sup>236</sup> ibid, p. 109

*shari'a's* principle of justice and applied the *Gono Gini* rule anyway. This case is very important in affirming that sharing the matrimonial wealth among spouses is fair regardless of the gender of the spouse and the provider of the initial capital.

*Court case no.3:*

This case is illustrated to show how the matrimonial wealth is divided among wives in case of polygamy. In the first case, the court distinguished between matrimonial assets according to the time of their purchase. In this case the court excluded the second wife and her children from sharing the assets purchased when the husband was married to the first wife only, as will be illustrated. However, it is problematic with regards to the method of allocating a share in the assets purchased during the course of marriage with the second while the first marriage still holds.

The case states that a man was married to two wives. He gave a land to the daughter of the second wife. The children of the first wife claimed that they had a right to this land because it was acquired when the husband was married to the first wife only. The court stated each marriage should be regarded as a separate economic entity, with each having its own matrimonial wealth. Since the land was purchased during the marriage time of the first wife only, then she is entitled to a share in it and the land was thus retrieved to the plaintiff.<sup>237</sup>

*Court case no.4:*

This is another case that involves sharing the matrimonial wealth in case of polygamy. According to the court, they took the number of years of marriage as an indicator in their allocation of the wives' share in the matrimonial wealth as shown below.<sup>238</sup>

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<sup>237</sup>Bearman, P. J., et al. *The Law Applied: Contextualizing the Islamic Shari'a: A Volume in Honor of Frank E. Vogel*. I.B. Tauris, New York; London; 2008, p. 110

<sup>238</sup> Similar to the guideline Prof. Amna Nosseir is calling to be adopted in applying the right of *al-Kadd wa al-Se'aya in Egypt*, as will be mentioned in chapter four

A man was married to two women. He was able to acquire a piece of land because he worked as a laborer in it for 20 years. The second wife was married to him for 12 years of those 20. Thus, upon divorce the court gave her 12/20 of half the matrimonial wealth.<sup>239</sup> This case illustrates a manner that can be followed in the allocation of the matrimonial wealth among spouses in case of polygamy.

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<sup>239</sup> Bearman, P. J., et al. *The Law Applied: Contextualizing the Islamic Shari'a: A Volume in Honor of Frank E. Vogel*. I.B. Tauris, New York; London; 2008, p.110

### *Section Three: Malaysia*

Malaysia had two courts in its judicial systems: *Shari'a* courts for Muslims and common courts for non-Muslims.<sup>240</sup> *Majlis Agama Islam* (Islamic Religious council) supervised the *Shari'a* courts, which rule in personal status law cases related to marriage, divorce and matrimonial wealth division of Muslims and regulates *Shari'a* courts' guidelines.<sup>241</sup> In 1971, under the rule of Mahatir Mohammed, the Royal Commission was appointed to draft a uniform set of personal status laws to be applicable all over Malaysia, as opposed to each federation having its own personal status law.<sup>242</sup> The Commission drafted Act 1972 that was enforced in 1982.<sup>243</sup> The Act specified that the Islamic *Shari'a* (*hukum syarak*) will be used in governing Muslim family matters.<sup>244</sup> The Malaysian government shifted the personal status law from being based on '*urf*' to one that is based on coherent Islamic jurisprudential guidelines and a unified code governing all family issues was thus developed.<sup>245</sup>

However, the personal status laws developed by Act 1972 did not promote women's equal status.<sup>246</sup> For instance, it requested women to have a *walli's* consent (guardian) to get married, unlike men. In reaction to this, Feminists activists, through *Sister in Islam* (SIS), demanded the Malaysian government to amend many provisions in the personal status law.<sup>247</sup>

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<sup>240</sup>Reddy, Rita. "Marriage and Divorce Regulation and Recognition in Malaysia." *Personal status law quarterly*. Please refer to footnote no. 32

<sup>241</sup>*ibid*

<sup>242</sup>Siraj, Mehrun. "Women and the Law: Significant Developments in Malaysia." *Law & Society Review*, vol. 28, no. 3, 1994, p. 563

<sup>243</sup>*ibid*

<sup>244</sup>*ibid*, p. 568

<sup>245</sup>Syed Hassan, Sharifah Z., and Sven Cederroth. *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflict Resolution in the Syariah Courts*. Vol. no. 75. Curzon, Richmond, England, 1997. P. 37

<sup>246</sup>Moustafa, Tamir. "Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia." *Law & Social Inquiry*, vol. 38, no. 1, 2013, p. 168

<sup>247</sup> Sisters in Islam (SIS) is an Islamic feminist NGO, working to promote gender equality, justice, freedom and dignity in Islam and empower women to be advocates for change. It is based in Malaysia.

Source: <http://www.sistersinislam.org>, accessed 24<sup>th</sup> of December 2017

Source: Archer, Brad. "Personal status law Reform and the Feminist Debate: Actually-Existing Islamic Feminism in the Maghreb and Malaysia." *Journal of International Women's Studies*, vol. 8, no. 4, 2007, p. 49

SIS drafted a model for personal status law and presented it to the government, requesting the following to be amended in the personal status law:<sup>248</sup>

- 1- Same minimum age for marriage for both genders.
- 2- Women being able to marry themselves without a *walli* (guardian).
- 3- Having a standard marriage contract applied to all Muslim marriages in Malaysia.
- 4- Polygamy is to be limited to special circumstances and the first wife should approve of it.
- 5- Equal right to the custody of children.
- 6- “*Equal division of matrimonial assets, instead of the standard practice of awarding only one third of the assets to the wife.*”<sup>249</sup>

*Division of the Matrimonial Wealth (Harta Sepencarian):*

According to the Malaysian ‘urf, wives were entitled to one third of the property acquired by the husband upon the termination of marriage to acknowledge her efforts in the household.<sup>250</sup> The state based the new law on the fact that the role of women has become broader in modern societies;<sup>251</sup> as shown in section 58, of Act 1984, section 122: <sup>252</sup>

*“(1) The Court shall have power, when permitting the pronouncement of talaq (divore) or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. (2) In exercising the power conferred by subsection (1), the Court shall have regard to— (a) the extent of the contributions made by each party in money, property, or labor towards acquiring of the assets; (b) any debts owing*

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<sup>248</sup>Anwar, Zainah, and Jana S. Rumminger. "Justice and Equality in Muslim Personal status laws: Challenges, Possibilities, and Strategies for Reform1." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, p. 548

<sup>249</sup> *iBid*

<sup>250</sup><http://www.sistersinislam.org.my>, “Further Discrimination Against Muslim Women under the Islamic Personal status law (Federal Territories) (Amendment) Bill 2005 through selective gender neutral provision,

<sup>251</sup> *Ibid*

<sup>252</sup> Amended in 2005.

*by either party that were contracted for their joint benefit; (c) the needs of the minor children, of the marriage, if any, and, subject to those considerations, the Court shall incline towards equality of division. (3) The Court shall have power, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.”<sup>253</sup>*

As it is stated in the article above, the wife is entitled to a share of the matrimonial wealth to compensate her for her labor in the household, even if she did not contribute financially in the breadwinning of the household.<sup>254</sup> Furthermore, the division of the matrimonial wealth would be calculated in proportion to each spouse’s labor and financial contribution in the development of the matrimonial wealth. Also, the court is to take into consideration debts borne on any spouses that are to be settled before the division of the matrimonial wealth because spouses are treated as an economic entity wherein debts should be settled prior to any division of capital. The court also takes into consideration the financial needs of the spouses’ children to make sure that the division of the matrimonial wealth will not adversely affect the children’s financial status. It is worth noting here that the Malaysian law does not specify equal division of the matrimonial wealth, but encourages judges to lean towards equal division. In reality, judges tend to divide the matrimonial wealth either on a 49%-51% basis or a 40%-60% basis to be as close to an equal division as possible. Horowitz added that even if the wife committed adultery, she should not be denied her share in the Matrimonial wealth.<sup>255</sup>

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<sup>253</sup> <http://www.musawah.org>, accessed 27<sup>th</sup> of December 2017

<sup>254</sup> Matrimonial wealth in Malaysian personal status law includes property owned by the spouse before initiating the marriage, and which value has increased during the time of marriage.

<sup>255</sup> Anwar, Zainah, and Jana S. Rumminger. "Justice and Equality in Muslim Personal status laws: Challenges, Possibilities, and Strategies for Reform1." *Washington and Lee Law Review*, vol. 64, no. 4, 2007, p. 562

Below are some Malaysian court cases that dealt with *Harta Sepencarian* (Matrimonial Wealth Division). Some of those cases are very interesting, for example in a court case it was stated that the wife provided her husband “*peace of mind*” that helped him in developing his wealth; therefore, she is entitled to a share of the matrimonial wealth.

Court case no.1: Tengku Anun Zaharah versus Dato’ Dr. Hussein:

The wife did not contribute financially or physically to the development of the matrimonial wealth. However, the judge gave her a share in it because the wife used her connections to help her husband purchase a piece of land that was included in the matrimonial wealth. <sup>257</sup>

Court case no.2: Mansjur bin Abdul Rahman versus Kamariah bte. Noordin:

Mansjur is not Malay. He was granted the permission from Malay authority to acquire a land on the sole basis that he was married to Kamariah, a Malay citizen. When the couple agreed to divorce, Kamariah was entitled to an equal share of the land Mansjur bought because Mansjur could not have bought the land if he had not married Kamariah.

Court case no.3: Rokiah versus Mohamed Idris:

Rokiah was granted one third of the properties that her ex-husband, Idris, purchased during their marriage.<sup>258</sup> The court based its judgment on the fact that Rokiah had indirect contribution to the household through taking care of the children and doing household chores.<sup>259</sup> The Court added that according to Islamic jurisprudence, a wife is not obligated to

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<sup>256</sup>Primary court cases are registered in Malay. Secondary sources were referred to.

<sup>257</sup>Siraj, Mehrun. “Women and the Law: Significant Developments in Malaysia.” *Law & Society Review*, vol. 28 no. 3 1994, p. 568

<sup>258</sup>Horowitz, Donald L. “The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change.” *The American Journal of Comparative Law*, vol. 42, no.2, 1994, p. 233

<sup>259</sup>Quraishi, Asifa, and Frank E. Vogel. *The Islamic Marriage Contract: Case Studies in Islamic Family Law*. vol. 6., Islamic Legal Studies Program, Harvard Law School, Cambridge, Mass, 2008

serve her husband by cooking, washing ...etc. As stated in the court record, “*the intent of marriage in Islam is to enjoy each other company.*”<sup>260</sup> Rokiah had assisted her husband in looking after the house and children and keeping him company in life and business. According to the court. It was because of her company that Idris was able to purchase his property. Thus, Rokiah is entitled to a share of the matrimonial wealth, even though she made no financial contribution in developing it.

Court case no.4: Noraini Mokhatr versus Abdel Halim Samat:

The court authorized Noraini to have half of the matrimonial wealth.<sup>261</sup> The court based its ruling regarding the property of Samat on the verse 228 in *Surat al-Baqarah* that recites: “*and wives shall have rights similar to those over them, according to what is equitable, and men (husbands) have a degree over them.*”<sup>262</sup> According to this verse, women are equal to men in rights and responsibilities. Since in the case of Noraini and Abdel Halim, both of the spouses contributed financially to acquire the matrimonial property, it should be considered a joint property and thus should be divided equally among both spouses, according to the court’s ruling.<sup>263</sup>

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<sup>261</sup>Quraishi, Asifa, and Frank E. Vogel. *The Islamic Marriage Contract: Case Studies in Islamic Family Law*. vol. 6., Islamic Legal Studies Program, Harvard Law School, Cambridge, Mass, 2008, p. 194

<sup>261</sup> *ibid*

<sup>262</sup> *ibid*

<sup>263</sup> *Ibid* p. 195

<sup>263</sup> *ibid*.

<sup>263</sup> *Ibid*.



### *Conclusion:*

Morocco, Indonesia, and Malaysia are all Muslim countries which acknowledged the entitlement of the wife to a share in the matrimonial wealth in their legal codes. After their independence, those countries readopted the right of *al-Kadd wa al-Se'aya*, *Gono Gini*, or *Harta Specaraian*, as it was rooted in their *'urf* before colonization. These three Muslim countries whose legal systems are aligned with the Qur'anic text and Islamic jurisprudence attempt to put verse 32 in *Suratal-Nisa'a* into action. They were able to incorporate the right of *al-Kadd wa al-Se'aya* into their legal systems while following different schools of Islamic jurisprudence and also due to the support of their respective governments, which probably aimed at promoting women's status to be on the same line with the rest of the international community. The right of *al-Kadd wa al-Se'aya* was litigated in courts because the religious clergy, legal professions and spouses in those countries were probably able to understand the Qur'anic text in an egalitarian manner and were also aware of the magnitude of the women's role in the household. According to Anwar, "*if these practices occur in the name of Islam in some countries, they can be replicated in other countries as well.*"<sup>264</sup> The coming chapter will attempt to examine the applicability of translating the right of *al-Kadd wa al-Se'aya* into a law in the Egyptian legal code.

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<sup>264</sup> Anwar, Zainah, and Jana S. Rumminger. "Justice and Equality in Muslim Personal status laws: Challenges, Possibilities, and Strategies for Reform1." *Washington and Lee Law Review*, vol.

## Chapter Four: The Right of *al-Kadd wa al-Se'aya* and Recommendations for its

### Application in the Egyptian Personal Status Law

Egyptian personal status law serves as guideline for the articulation marital relation and is based on the Qur'anic text and Islamic jurisprudence as having a basis of family law in sacred text will provide binding coverage for the law.<sup>265</sup> In addition, Islamic jurisprudence was never stagnant as plurality in jurists' opinion was always welcomed and encouraged. Some of Egyptian Jurists have been responsive to changes in society through *ijtihad* backed up by years of studying Quran, Arabic language grammar, Islamic jurisprudence and Prophetic Sunnah. Among those jurists were Mohammed Abduh and Rashid Reda who regard *Maslahah* (common good) as a key concept with respect to Islamic Jurisprudence, thus responding to many societal changes at their time and accommodating to society's needs in the Egyptian legal code.<sup>266</sup> Among the changes Abduh incurred to the formulation of the Egyptian personal status law is having them based on "*supra madhab*", meaning that that Egyptian personal status law is not confined to specific jurisprudence school.<sup>267</sup> The judge should refer when making his jurist decision to any jurisprudence school's opinion that will yield the best interest of the both litigants.

However, according to Sharf El-din, Egyptian personal status law is based on the patriarchal perception of the society which led to legally denying women from being on the same footage as men in front of family law. An example of the injustice imposed on women in the law is the concept of *Quammaw* which refers to the notion that household maintenance is the sole responsibility of the husband and its effect on the marital relation

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<sup>265</sup>Abou-Bakr, O. (2013). *Feminist and Islamic Perspectives*. Cairo: The Women and Memory Forum, p. 62

<sup>266</sup>Abu-Odeh, Lama. "Modernizing Muslim Family Law: The Case of Egypt." *Vanderbilt Journal of Transnational Law*, vol. 37, no. 4, 2004, p. 1043.

<sup>267</sup>*ibid*

dynamics.<sup>268</sup> According to Egyptian personal status law, women are not required to contribute in the household maintenance.<sup>269</sup> Thus inclining a hierarchal relationship between spouses, having the husband in a superior position for being the legal breadwinner.<sup>270</sup> However, most Egyptian families are not sustained on one income and women most of times contribute to household maintenance.

In this chapter the possibility of accommodating the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law will be illustrated. The relation between the Islamic jurisprudence and formulating the family laws in Egypt will be illustrated. Then an assessment of the applicability of incorporating the right of *al-Kadd wa al-Se'aya* in Egyptian personal status laws, based on the point of views of 10 interviewees will be illustrated and analyzed. The interviews were conducted with Academics, feminists, Azhari scholars and a working wife, whose case is mentioned in the introduction, and who I am dedicating the thesis for.

The main purpose of the interview was to assess from the interviewees' perspectives the possibility of translating the right of *al-Kadd wa al-Se'aya* into a law in the Egyptian Family legal system. Also, it is an attempt to identify the key agent, in the Egyptian society, responsible for calling for this right to be incorporated in the Egyptian legal system. Furthermore, it is an attempt to recognize potential resistance to translating the right of *al-Kadd wa al-Se'aya* into a law. Lastly, potentially the interviews will illustrate the impact of having the right of *al-Kadd wa al-Se'aya* translated into the Egyptian personal status law on the marital institution social dynamics.

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<sup>268</sup> There is a debate related to the gender based role in *Shari'a*, what constitutes *Qwamma* and what is the responsibility of women in exchange for the household maintenance. Please refer to the Introduction and Chapter Two.

<sup>269</sup> Moussa, Jasmine. *Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Shari'a-Derived Legislation*. vol. 4, Brill, Boston;Leiden; 2011. P. 173

<sup>270</sup> *ibid*

The selection of interviewees was aiming to be diversified as possible. Gender studies related Academics interviewed are Professor Ibrahim Elnur, Professor Nadia Farah, Professor Martina Rieker and Professor Hania al-Sholkamy. Professor Ibrahim Elnur, worked as the Director of the Middle East Research Awards at the Population Council and in the Graduate Committee of Gender Studies department at the American University in Cairo.<sup>271</sup> Professor Elnur has conducted research in the field of “feminization of the labor process and family dynamics”.<sup>272</sup> Thus, he has a grass rooted knowledge of the undercurrents of the marital relations and how potentially the law of *al-Kadd wa al-Se’aya* would be received in Egyptian society. Furthermore, Professor Nadia Farah worked as a Gender and Development Expert for UN Organizations (FAO, UNICEF, UNDP, UNIFEM, UNESCO and UNAIDS).<sup>273</sup> Professor Farah, also has been studying and working on the development of lower class Egyptian women. Prof. Farah will add the perception of lower income class women regarding the introduction of the right of *al-Kadd wa al-Se’aya* as a law. Women from lower income class perspective is important, because as Professor Nesrine Badawi highlighted, most of the feminist activists come from higher social standards, thus they mainly advocate the right of women of their social standards. So, to fill in this gap, Professor Farah’s input is valuable. Professor Martina Rieker, is the Director of the Institute for Gender and Women’s Studies at The American University in Cairo.<sup>274</sup> Her Research topics include Women’s Rights: The Human Rights versus Civic Rights Framework in Egypt and India.<sup>275</sup> Rieker has a solid knowledge of the extent of gender discrimination in the Egyptian personal status law. Thus, she can advise regarding the extent to which the right of *al-Kadd wa al-Se’aya* might alleviate injustice borne on Egyptian women, how can feminists activists might pressure the state to adopt such a law, and how Egyptian women might perceive this law. Professor Hania

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<sup>271</sup><http://www.aucegypt.edu/fac/ibrahimelnur>, accessed 5<sup>th</sup> of January, 2017.

<sup>272</sup> *ibid*

<sup>273</sup><http://www.aucegypt.edu/fac/nadiafarah>, accessed 5<sup>th</sup> of January, 2017.

<sup>274</sup><http://www.aucegypt.edu/fac/martinarieker>, accessed 5<sup>th</sup> of January, 2017

<sup>275</sup> *ibid*

al-Sholkamy, is Professor of Anthropology, her PhD was received from London School of Economics, and currently works as Associate Research Professor at the Social Research Center of the American University in Cairo. <sup>276</sup> Al-Sholkamy worked closely with the Ministry of Social Solidarity, as special Advisor, advocating women rights where she “lobbied for the right of women to receive welfare and pensions in their own right and not as dependents”. <sup>277</sup> Al-Sholkamy has a sound knowledge of the financial problems that face Egyptian women in the marriage institution. Thus, she will probably add an insight to the extent the *right of al-Kadd wa al-Se’aya* will solve a social problem in Egypt or not. Also, given her field experience, she will probably add an insight to the potential opposition the *right of al-Kadd wa al-Se’aya* might face.

Professor Omaila Abou-Bakr was interviewed because she has a background in Islamic feminism, meaning that she advocates women right, within the scope of Islam. Professor Abou-Bakr is a founding member of the *Women and Memory Forum*, and is a Researcher in *Musawah*. <sup>278</sup> Professor Abou Bakr probably will illustrate the extent to which Islam promoted women status through the Qur’anic scripture with special attention to verse 32 in *surat al-Nisaa’*.

To investigate legal profession point of view regarding the applicability of translating the right of *al-Kadd wa al-Se’aya* into a law, Professor Nora Salem and Professor Nesrine Badawi were interviewed. Professor Salem received her PhD degree in Law from Friedrich-Schiller University in Germany. <sup>279</sup> Her PhD dissertation is titled “*The Impact of the Convention on the Elimination of All Forms of Discrimination against Women on the*

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<sup>276</sup><http://www.aucegypt.edu/fac/haniasholkamy>, accessed 5<sup>th</sup> of January, 2017

<sup>277</sup> *ibid*

<sup>278</sup> *Musawah* “is a global campaign conducted by the Sisters in Islam Organization, based in Malaysia”, with the aim to reforming Muslim countries family laws in a manner that alleviate injustice on women.

<http://www.wmf.org.eg/en/member/omaima-abou-bakr>, accessed 5<sup>th</sup> of January, 2017

<sup>279</sup><http://www.aucegypt.edu/fac/norasalem>, accessed 5<sup>th</sup> of January, 2017

*Domestic Legislation in Egypt*".<sup>280</sup> Her academic specialization is discrimination against women in Egyptian personal status law, thus her insight is valuable with regard to the articulation of the right of *al-Kadd wa al-Se'aya* as a law in a manner that potentially will not be discriminative to women. Professor Badawi holds a PhD in law from the School of Oriental and African Studies.<sup>281</sup> Professor Badawi's specialization is Islamic jurisprudence and law, thus her input will be valuable in the articulation of the right of *al-Kadd wa al-Se'aya* into law. Prof. Badawi is familiar with Egyptian feminist movements and their role in pressuring legal professions to promote women status by drafting more egalitarian laws.

The fourth category of interviewees was conducted with Muslim scholars from al-Azhar specialized in Islamic Jurisprudence. Professor Amna Nosseir, who is also calling for women being entitled to her share of the matrimonial wealth, added some parameters to how to calculate this share based on different variables such as the duration of marriage. Dr. Nosseir is a member in the Egyptian parliament, thus she has a sense of the potential reaction of other Egyptian parliament members in regard to having the right of *al-Kadd wa al-Se'aya* as a law. Sheikh Mahmoud Awwad is a progressive Islamic scholar and a holder of MA degree in Islamic Jurisprudence from al-Azhar University. Sheikh Awwad's insight with regard to the soundness of the right of *al-Kadd wa al-Se'aya* from Islamic Jurisprudence is needed to justify the call for having it into Egyptian personal status law. Lastly, Dr. Amr el-Werdani, is a holder of PhD in Islamic jurisprudence from al-Azhar University. Dr. el-Werdani is opposing the idea of allocating a share in the matrimonial wealth to the wife, thus his argument needs to be illustrated and analyzed.

Lastly, the significance of the role feminists NGOs plays in pressuring the governments and alleviating the awareness of the society in regard to women rights cannot be denied. Thus, it

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<sup>280</sup><http://www.aucegypt.edu/fac/norasalem>, accessed 5<sup>th</sup> of January, 2017

<sup>281</sup><http://www.aucegypt.edu/fac/nesinebadawi>, accessed 5<sup>th</sup> of January, 2017

was crucial to interview a feminist activist, know her perspective with regard to the right of *al-Kadd wa al-Se'aya* and its applicability to be incorporated into the Egyptian personal status law. Ms. Mozn Hassan, an Egyptian feminist and human right defender and founder of Nazra Foundation, was chosen to be interviewed, to know her insights regarding the right of *al-Kadd wa al-Se'aya*.<sup>282</sup> Ms. Hassan has a solid knowledge of feminists NGOs role throughout Egyptian history in defending and shaping family laws in Egypt. Her opinion with regard to the method of approaching and employing feminists NGO in advocating and lobbying for the right of *al-Kadd wa al-Se'aya* will be beneficial for the study.

#### *Interviews' Outcomes:*

The Interviews highlighted some of the prerequisites for having the right of *al-Kadd wa al-Se'aya* incorporated in the Egyptian personal status law, and some types of resistances its application might face. In order to have the state support for incorporating this right in Egypt, the state has to confirm its economic, legal and political advantages.<sup>283</sup> For example, state might be interested to adopt it to appeal to the Western societies and depict the Egyptian government as egalitarian. However, the state might be reluctant to apply such a law, to avoid problems with some of the traditionalist faction of the Egyptian population to secure their votes.<sup>284</sup> Also, the state might be in tension between wanting to appeal to the Western society as “modern” state that promotes women rights, and trying to please the traditionalist in the society to secure their votes.<sup>285</sup> Hence the importance of emphasizing that the right of *al-Kadd wa al-Se'aya* is grounded in the Quran in verse 32 in *surat al-Nisaa'*, and that not applying is actually against the Qur'anic text.<sup>286</sup>

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<sup>282</sup> Nazra Foundation: a foundation that aim at protecting women's rights and promoting women status in Egypt. source: <http://rightlivelikelihoodaward2016.org/mozn-hassan-nazra>, accessed on 5th of January, 2017

<sup>283</sup> Rieker, Martina. Personal Interview. 5<sup>th</sup> of December 2017.

<sup>284</sup> Farah, Nadia, Personal Interview, 10<sup>th</sup> of December, 2017

<sup>285</sup> *ibid.*

<sup>286</sup> Please refer to chapter one

Furthermore, according to Article 11 of the 2014 Egyptian Constitution, the state is to eliminate gender inequality.<sup>287</sup> Egypt signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981, which obliges Egypt internationally to take all appropriate measures to guarantee gender equality de jure and de facto. According to Article 16 CEDAW, all state parties have to eliminate gender discrimination in family relations.<sup>288</sup> Based on Egypt's Sharia-based reservation to Article 16 CEDAW, Egypt evaded an obligation to implement this article if that would result in a violation of Sharia law. That in turn however means that Egypt is obliged to implement gender equality in family relations where no contradiction between Sharia law and the CEDAW occurs. Thus, there is an international legal and constitutional obligation upon Egypt to issue laws that promote women status.<sup>289</sup> Accordingly, the Egyptian government should work to promote egalitarian status for women, which can be potentially achieved through applying the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law, as it acknowledges that women are equal economic partners in the marriage institution. This draws the attention to the importance of the role of the feminist NGO in advertising for any change favoring women, and in pressuring the state to incorporate it in its legal code.<sup>290</sup> The Egyptian constitution refers to any *sunni* school of jurisprudence (*supra-madhab*) as a source of law. Thus, if the Ibn 'Ardun's fatwa is accepted in the Maliki *madhab*, it can be adopted in the Egyptian personal status law.<sup>291</sup>

Among the economic advantages that the Egyptian society may reap from the application of the right of *al-Kadd wa al-Se'aya* is calculating and monetizing women's labor which is

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<sup>287</sup>Salem, Nora. Personal Interview. 5<sup>th</sup> of December, 2017.

<sup>288</sup> CEDAW: UN Committee on the Elimination of Discrimination against Women Please refer to chapter three for more information about its role and agenda.

<sup>289</sup>Salem, Nora. Personal Interview. 5<sup>th</sup> of December, 2017

<sup>290</sup> Hassan, Mozn. Personal Interview. 12<sup>th</sup> of December, 2017.

<sup>291</sup>Ibid.



sometimes of a greater span physically and financially than that of men in the household.<sup>292</sup> According to a study done covering upper Egypt, it was found that women contribute to 60% of the labor needed to support the house (household, childcare, harvesting, tender to cattle, etc).<sup>293</sup> In Muslim and non-Muslim countries, women's labor is not visible, as far as GDP is concerned. Hence, there is a need to alleviate the consciousness of Egyptian society with regard to women's rights, for the right to be socially accepted.<sup>294</sup> However, special attention to the socioeconomic dimension of legally adopting the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law because it varies depending on the social and economic class the spouses belong to. Furthermore, the right of *al-Kadd wa al-Se'aya* might face opposition from some lower income class uneducated Egyptian women.<sup>295</sup> For example, when the Egyptian government wanted to ban FMG, it faced opposition from Egyptian women in Upper Egypt, as they were mostly traditionalist and believed it is a religious request. Egyptian women refer to the Egyptian *Dar al-Ifta* in their daily affairs. Thus, if the Egyptian religious clergy opposed the law, some Egyptian women might be skeptical of its legitimacy fearing to take an unlawful right, thus they will abandon it. To build on this point, Prof. Farah added that the right of *al-Kadd wa al-Se'aya* might face huge resistance from traditionalists, who do not advocate egalitarian status for women.<sup>296</sup> Therefore, to have the backup from al-Azhar that authenticates its soundness in Islamic Qur'anic text, through real free *ijtihad*.<sup>297</sup> Al-Azhar should “*inspire people to do the right thing*”, by promoting more egalitarian interpretation of the Qur'anic text.<sup>298</sup> Furthermore, in urban areas, the division of the marital property would be more acceptable than in rural areas, where women are denied their share

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<sup>292</sup>Elnur, Ibrahim, Personal Interview. 5<sup>th</sup> of December, 2017.

<sup>293</sup>*ibid*.

<sup>294</sup> *ibid*

<sup>295</sup> *ibid*

<sup>296</sup>Farah, Nadia, Personal Interview, 10<sup>th</sup> of December, 2017

<sup>297</sup>Sholkamy, Hania. Personal Interview. 12<sup>th</sup> of December, 2017

<sup>298</sup>*Ibid*.

of inheritance, thus, it will be harder to apply the right of *al-Kadd wa al-Se'aya* in rural areas than in urban areas, which is another aspect to be addressed by the legal personnel drafting the law.<sup>299</sup> In addition, it is important to have the law to force the *ma'zoun* (marriage officials/registrars) to add the right of *al-Kadd wa al-Se'aya*, as a provision, in the marital contract if requested by any of the spouses, since in real life, they are the one who register the marital contract, thus their role is important in litigation.<sup>300</sup> Similarly, the human factor in the application of the law, represented by the judge, who ultimately makes his/her judgments based on his/her perception of the law, thus awareness of the legitimacy of the right of *al-Kadd wa al-Se'aya* in the Qur'anic text should be emphasized.<sup>301</sup> A concern also related to the human aspect of the application of this right is that women, who want to pursue a career, might be told by their husbands to stay at home, since with the application of the law, will be technically paid, which might not be aligned with what these women want.<sup>302</sup> Another concern that was raised is related to the effect of adopting the right of *al-Kadd wa al-Se'aya* on women's say in issues related to children raising; women who play this role, are given some kind of leverage, because their role is not monetized.<sup>303</sup>

In addition, there is a social aspect that arises in women actually asking for their share in the matrimonial wealth, which is shyness, as some Egyptian women although they know that breastfeeding should be financially compensated, as per Islamic jurisprudence, they do not ask for financial compensation for breastfeeding their children, because it is socially unacceptable.<sup>304</sup> For example, in an interview with Egyptian working mother and a wife, she added that she used to contribute financially in household maintenance of the household, *"sometimes, there are missing essentials for the household, and my husband does not have*

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<sup>299</sup> Sholkamy, Hania. Personal Interview. 12<sup>th</sup> of December, 2017

<sup>300</sup> Hassan, Mozn. Personal Interview. 12<sup>th</sup> of December, 2017.

<sup>301</sup> Badawi, Nesrine. Personal Interview. 26<sup>th</sup> of December 2017.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> Taha, Hoda. Personal Interview. 25<sup>th</sup> of December 2017.

money. What shall I do? I pay them, and I did not ask my husband to pay me back.”<sup>305</sup> The fact that Mrs. Taha was shy to ask her husband for her money back shows that there is a social/human element that hinder women from asking for their financial rights, and this should be taken into consideration. Another example is when Mrs. Taha indicated that she was shy to ask for her breastfeeding wage, although she is aware that it is her financial right that it stressed upon in the Qur’anic text, because it was socially stigmatized for women in the middle income class to ask her breastfeeding financial compensation.

The interviewees also shared several suggestions to the application of the right of *al-Kadd wa al-Se’aya* in Egypt. For example, the right of *al-Kadd wa al-Se’aya* can be added as a clause in an annex to the marriage contract, having spouses sign whether they will agree to its application and divide the matrimonial wealth accordingly or not in case of divorce.<sup>306</sup> Furthermore, the provision/clause in the marriage contract related to the right of *al-Kadd wa al-Se’aya* should indicate that financial liabilities will be shared between spouses as well, in case of divorce.<sup>307</sup> Awwad gave the example of children’s school tuition fees that will be the responsibility of both spouses, if the wife receives her share of the matrimonial wealth upon divorce.<sup>308</sup> Both man and wife have a joint account, in which they deposit all their income jointly, and in case of divorce, both spouses share equally the funds in this joint account.<sup>309</sup> Another suggestion was mentioned by Prof. Nosseir who differentiated between marriages in terms of their duration. If the marriage duration was less than or equal to 5 years, wives should receive 5% of the increment occurred in the matrimonial wealth, calculated from the first day of marriage.<sup>310</sup> Women in a marriage that is sustained for 10 years or more are entitled to 10% of the development occurred in the matrimonial wealth, calculated from the

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<sup>305</sup>Taha, Hoda. Personal Interview. 25<sup>th</sup> of December 2017.

<sup>306</sup>Sholkamy, Hania. Personal Interview. 12<sup>th</sup> of December, 2017.

<sup>307</sup>Interview. Mahmoud Awwad 22<sup>nd</sup> of December 2017.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Nosseir, Amna. Personal Interview. 12<sup>th</sup> of December, 2017

first day of marriage. Lastly, if a marriage was sustained to a period of 25 years or more, then a wife is entitled to half the development occurred to the matrimonial wealth.<sup>311</sup> Furthermore, another suggestion to the application of the right of *al-Kadd wa al-Se'aya* is related to the articulating of it into a law, which entails it being generally applied to all Egyptian women in the same manner, which sometimes will not always be fair, for example, equating working wives with stay at home wives.<sup>312</sup> Therefore, the financial compensation should be set in court on a case by case basis to investigate the amount of labor provided by each wife, and allocate a share to her in the matrimonial wealth accordingly.

#### *Conclusion:*

There is a general trend among interviewees, from different educational, cultural and social background, to advocate incorporating the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law because they view it as objective and an acknowledgement of a financial right of Egyptian women that has been ignored. Each interviewee added his/her perspective of the thesis supplementing it with insightful inputs that further legitimized the thesis hypothesis.<sup>313</sup> Some interviewees agreed that it is the responsibility of feminists NGOs to call for the application of the law in Egypt.<sup>314</sup> Others believed that all society agents (lawyers, al-Azhar, Egyptian media ...etc) should work together to push the Egyptian government adopt the law, as Ms. Hassan put it; it should be a “*wholistic approach*”. A reference to the importance of highlighting to governmental personnel the interest of the state to guarantee the support/consent of the state in adopting the right of *al-Kadd wa al-Se'aya* as a law, was mentioned.<sup>315</sup> Another reference to the legal obligation on the Egyptian government by the

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<sup>311</sup>Nosseir, Amna. Personal Interview. 12<sup>th</sup> of December, 2017

<sup>312</sup> Abu-Bakr, Omaina. Personal Interview. 21<sup>st</sup> of December, 2017

<sup>313</sup> That women are entitled to their share in the matrimonial wealth in exchange to their labor as stated in verse 32 in *surat al-Nisaa'*

<sup>314</sup> Please refer to Prof. Reiker interview

<sup>315</sup> Ibid.

Egyptian constitution and international agreement to alleviate any discrimination or injustice borne on Egyptian women was highlighted.<sup>316</sup> Both points are beneficial when lobbying for the law to be approved by the Egyptian parliament. Another contribution that highlighted the importance of raising the awareness of the Egyptian society with the Qur'anic basis of the right of *al-Kadd wa al-Se'aya*, to prepare the members of the society to the introduction of the its law and have their support to its application, since it is a novel concept to the Egyptian society.<sup>317</sup> Such awareness can be raised by the efforts of not only the social agents mentioned earlier, but also with the aid of some UN bodies, such as UNDP and/or UN Women.<sup>318</sup> This awareness is crucial especially in rural areas, where the application of the right of *al-Kadd wa al-Se'aya* will be harder than that in urban areas, because rural women are more likely to be deprived their financial rights than urban women, as highlighted earlier.<sup>319</sup> A reference was made to the effect of adopting the right of *al-Kadd wa al-Se'aya* into Egyptian personal status law on the spousal relation which has a human dimension, that will be affected by the new marital dynamics.<sup>320</sup>

One may conclude that the adopting the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law might face some resistance from some religious clergy, members of the society in Egyptian rural areas and the government if the application of the right would not benefit it's administration. The key factor in securing its adoption is stressing its roots in the Qur'anic text, soundness in Islamic jurisprudence and positive effect on Egyptian society in general and Egyptian women in particular. Such awareness is the responsibility of different agents, such as al-Azhar which has the tools necessary for free and sound *ijtihad*, and thus able to interpret the Qur'anic text and validate the soundness of the right of *al-Kadd wa al-*

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<sup>316</sup>Please refer to Prof. Nora Salem's interview.

<sup>317</sup> Please refer to Prof. Ibrahim Elnur's and Hoda Taha's interviews

<sup>318</sup> Please refer to Prof. Nadia Farah's interview

<sup>319</sup>Please refer to Prof. Hania Sholkamy's interview.

<sup>320</sup> Please refer to Prof. Nesrine's Badawi and Dr. Amr el-Werdani's interviews

*Se'aya* in it (especially verse 32 in *surat al-Nisaa* ). Another key agent is feminists NGOs whose members have an on ground knowledge of the problems Egyptian women face, and the amount of labor Egyptian women exert in the household and the labor market. Egyptian media professions, academics, sociologists and others, who value women's labor, should work collectively to prepare the awareness of the Egyptian society to adopting the right of *al-Kadd wa al-Se'aya* in Egyptian personal status law. Another important element in having the right of *al-Kadd wa al-Se'aya* incorporated in the Egyptian personal status law is the process and speed by which cases related to this financial right will be litigated and executed. In the process of getting a divorce, most of women tend to be with little funds, at least less than she used when she was married, because she grows destitute out of marriage.<sup>321</sup> However, she is expected to cover courts, lawyer's fees and transportation costs to/from court, thus the cost and duration of litigation in those cases are important to bear in mind.<sup>322</sup> According to Sonbol, women spend much time in courts before they receive their financial entitlements (such as *nafaqa*) due to lengthy paper work process, during which they have to sustain themselves and their children.<sup>323</sup> Sonbol added that in most cases the divorcee's parents are either dead or cannot financially cover her children expenses neither will her low salary, hence the need to shorten the bureaucratic process of securing that the wife receives her share of the matrimonial wealth.<sup>324</sup> Finally, marital relation shaped by the Egyptian personal status law has "contractual" dimension rather than "status" perspective, which allow for more flexibility in shaping the relationship legally.<sup>325</sup> Spouses can add provisions/clauses to their marital contract, which are shaped by their social status and illustrate their perception of their expected role in the household. Thus a clause in the marriage contract that discusses the

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<sup>321</sup>Sonbol, Amira E. A. *Women of Jordan: Islam, Labor, and the Law*. Syracuse University Press, Syracuse, NY, 2003, p. 174

<sup>322</sup> *ibid*

<sup>323</sup> *ibid*, p. 180

<sup>324</sup> *ibid*, p.181

<sup>325</sup>Abu-Odeh, Lama. "Modernizing Muslim Family Law: The Case of Egypt." *Vanderbilt Journal of Transnational Law*, vol. 37, no. 4, 2004, p. 1043

manner by which the matrimonial wealth will be divided in case of divorce, to accommodate to all different scenarios in which marriage occurs.

In conclusion, the thesis attempts to connect those classical theories with verse 32 in *Surat al-Nisaa'* that corresponds to that all labor should be monetized and financially compensated. Furthermore, the thesis also refers to the prevailing Sunni schools of jurisprudence and their perspective in regard to women's labor in the household, in an attempt to argue that women are exerting more labor than required of them by the *shari'a* and their labor entitles them to a share in the matrimonial wealth.

### Conclusion:

There is a general trend in Muslim and non-Muslim countries of not monetizing women's labor in the household, although there are many economic studies that agree that women's labor in the household is a valid economic activity. Women exert effort and spend time in promoting the wellbeing of the family and the household which they could have spent otherwise and this opportunity lost is not translated into a financial value, which might affect negatively those women's financial status and not position them on equal footing with their male counterparts. In addition, some women might feel that their efforts in the household are not appreciated nor acknowledged, which might have a psychological effect on their wellbeing. This study attempts to analyze the manner through which the Qur'anic text was able to respond to this problem and the manner through which some pre-modern Muslim jurists were able to translate the Qur'anic text into egalitarian Islamic jurisprudential concepts that can contain the pre mentioned problem. This study attempts to shed the light on some classic, medieval and pre modern interpretations of verse 32 in *surat al-Nisaa'* that are not widely referred to in the studies on the Quran which entails monetizing all labor exerted in general and thus can be extended to women's labor in the household.<sup>326</sup> This interpretation is shared by many great medieval Muslim scholars such as ibn Hazm (d. 1064), al-Tusi (d. 1067) and al-Baidawi (d. 1286). Similarly, the pre modern Muslim scholar who related the verse 32 in *surat al-Nisaa'* to monetizing labor is al-Kashani (d. 1679) in his *al-Saffi fi Tafsir Kalam Allah al-Waffi*, probably his interpretation was not widely spread in the pre modern time because then the interpretation which dealt with the story of revelation of the verse was more

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<sup>326</sup> Verse 32 in *surat al-Nisaa'* states, "And do not wish for that by which Allah has made some of you exceed others. For men is a share of what they have earned, and for women is a share of what they have earned. And ask Allah of his bounty. Indeed Allah is ever, of all things, knowing".



prevailing, as illustrated in chapter one. However, in modern time more Muslim scholars reverted back to interpreting verse 32 in *Surat al-Nisaa'* to be signaling that labor is the primary source of income and that any labor exerted should be monetized. Among the modern Muslim scholars who agreed to this interpretation are Muhammed Abduh (d. 1905), Muhammad Jamal al-Din al-Qassimi (d.1914) and Sayyid Qutub (d. 1966). The study also attempts to link this interpretation with the classic labor theories which indicates that labor is the main source of income and the main indicator of setting the price of any product or service. Classic theories of Ibn Khaldun, Karl Marx, John Locke and Adam Smith agreed that unpaid labor highlights inefficiency and thus it ought to be monetized. Furthermore, Locke argues that if labor cannot be financially compensated through wages, it can be compensated by allocating the provider of the labor the right to own property instead. If this argument to be extended to women's labor in the household, then women probably will be entitled to own a share in the matrimonial wealth since they do not receive wage for working in the household. Furthermore, their labor in the household ought not to be financially compensated in the form of wage of hired equals who provide similar economic activities, because wives role in the household has psychological dimension which is not offered by hired equals. This dimension also has a monetary value that entitles its provider (wives) to be equal economic partner in the development in matrimonial wealth. It is important to note that in Mamulk's time in Egypt it was acceptable in for spouses to ask for financial compensation to the effort and time they exerted serving their spouses as illustrated in chapter one.

The thesis argues that Islamic jurisprudence also was able to respond to the pre mentioned problem. Women's labor in promoting the well being of the family and the household is financially compensated through the Islamic financial right termed the right of *al-Kadd wa al-Se'aya*, which is defined as "*the right that covers all financial rights of the woman in the financial profit that develops because of her labor and that gets mixed up*

*spontaneously in the husband's financial assets during the course of their marriage, which entitles her to a share of that financial profit, when marriage ends*".<sup>327</sup> This financial right is not a novel right entitled to women, it was debated as early as the 15<sup>th</sup> century by Muslim scholars such as Abdul Rahman ibn al-Qassim (d. 1404), Abu Muhammed (d. 1588) and Muhammed ibn Nasser (d. 1642) who agreed that in all scenarios women labor in the household, their labor is to be financially compensated by allocating a share for them in the matrimonial wealth. Although, Muslim scholars did not specify the manner in which women's labor will be measured, some of them specified a certain share of the matrimonial wealth to be allocated to the wife upon divorce or the death of the husband. This share is in addition to her share in inheritance, in case of the death of the spouse, and is to be treated as an economic debt, meaning that women are entitled this share before allocating the shares of heirs. Furthermore, one pre modern Moroccan Maliki Muslim jurist, known as ibn 'Ardun, quantified women's share in the matrimonial wealth to be the half of the matrimonial wealth, many decades before this financial right is entitled to Western women in their personal status laws. Furthermore, the thesis attempts to investigate historical application of the right of *al-Kadd wa al-Se'aya* by illustrating some pre modern Moroccan *shari'a* court records that shows that this financial right was socially accepted and legally litigated and traded because it was rooted also in the Moroccan '*urf*. However, one may argue that although the right of *al-Kadd wa al-Se'aya* is not rooted in the Egyptian '*urf*, it can be accommodated in Islamic jurisprudence from which Egyptian personal status law derive its guidelines. Thus the study attempts to illustrate some Islamic jurisprudential concepts which can accommodate the right of *al-Kadd wa al-Se'aya* such as Implied *Ijara*, *Abdan* partnership, *Jabr* partnership, Enrichment Without Reason and Repudiation of Damage.<sup>328</sup> Each of these Islamic

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<sup>327</sup> Al-Mazkaldi, Omar, 2005. *Haq al-Kadd wa-al-Se'aya: Muhawalah fi al-Ta'sil*. Master Thesis. Muhamed al-Khamis, p. 21

<sup>328</sup> Please refer to chapter two.

jurisprudential concepts is analyzed and extended to the role of women in the household as discussed in chapter two.

Furthermore, three illustrative cases of Muslim countries which accommodated the right of *al-Kadd wa al-Se'aya* in their legal system are referred to set an example for having this right translated into the Egyptian personal status law, which the thesis is calling for. The study attempts to illustrate the process through which the state in these three countries was encouraged to adopt this right in their legal systems. For example, the credit goes to feminist's activists who pressured the state to adopt this right in Morocco and Malaysia versus the religious clergy in Indonesia. Also the discourse of the legal code of the three countries that deals with dividing the matrimonial wealth is highlighted with its development, if any. In addition, court cases from the three countries courts records were analyzed to illustrate the manner in which their judicial system applies the right of *al-Kadd wal-Se'aya* in their legal systems.

As mentioned earlier, the thesis is calling for the application of the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law to remove financial injustice borne on Egyptian women in marriage institution. However, attempts to find literature to discuss the applicability of this right in Egypt were unsuccessful. Therefore, interviews with academics, legal personnel, Azhari scholars, feminist activist and an Egyptian middle income middle aged urban woman were conducted to extract their perception regarding the applicability of having the right of *al-Kadd wa al-Se'aya* translated into a law in the Egyptian personal status law. The interviewees highlighted some challenges which might face the call for applying this law such as, resistance from some Egyptian traditionalists who opt for patriarchal interpretation of the Qur'anic text and would not lean towards allocating more financial rights to women. Some of those traditionalists are very influential in some rural areas which is evident when some rural women still opt for FMG thinking that it is a religious duty.

Furthermore, the social taboo which might be associated with demanding such right by the women themselves. One of the interviewees gave the example, that although some women are aware that they are entitled to a wage for breastfeeding their children as per the Qur'anic text in *Surat al-Talaq verse 6*, some of them are still shy to ask for it, because it is not socially acceptable to do so. Furthermore, the human aspect in the application of this law represented in the *Ma'zoun* (marriage registrar) and the judge, who need to be fully committed to the entitlement of women to this financial right is crucial to have just application of the law in Egypt.

To facilitate the application of this the right of *al-Kadd wa al-Se'aya* in Egyptian personal status law, several recommendations were highlighted by the interviewees. Most importantly is highlighting to the state the benefits it will reap if this right was included into its legal code. One of the most important benefits to the state might be appealing to the international community as an egalitarian state which works against elimination of any gender discrimination, which Egypt is legally bound to as per Article 11 of 2014 and Article 16 of CEDAW which Egypt signed.<sup>329</sup> Furthermore, according to the Egyptian constitution the definition of marriage in Egyptian Personal status law is “*Marriage is a contract between a man and a woman to whom she is legal whose purpose is to create common life ties and procreation*” which bind the state to legally support the law of *al-Kadd wa al-Se'aya* because a “common life” entails equal access to wealth, because common life signals a partnership rather than a relation limited to sexual gratification as indicted in Islamic jurisprudence.

Additional suggestion for the application of the right of *al-Kadd wa al-S'aya* is to be done on a case by case basis, as there are many parameters that affect the marital relation and it will be injustice to equate all Egyptian women in allocating a fixed share of the matrimonial wealth to all of them. Such parameters include the scenario in which women

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<sup>329</sup> Both articles legally bound Egypt to eliminate any gender discrimination, as illustrated in chapter four.

labor, do they work in the labor market and the household simultaneously? Do they labor in the household only? Do they labor in their husbands' projects/lands? Furthermore, the length of the marriage duration also should be taken into consideration. The amount of labor the woman provided in short term marriage differs from that of longer term marriage. Additionally, women who contribute financially to the household should not be equated with those who do not. Furthermore, a woman who as a household servant paid by the husband should not be equated with another who do not. All those parameters and many others affect the amount of effort women exert in promoting the well being of the household and the family and thus need to be taken into consideration.

Another crucial recommendation is to pay attention to the awareness of the society of such right which is a prerequisite to have the law of *al-Kadd wa al-Se'aya* put into action, because in some rural areas Egyptian women are denied their shares in inheritance fearing that the family might lose the assets if the women got married. To facilitate the application of the right of *al-Kadd wa al-Se'aya* in the Egyptian personal status law, the awareness of Egyptian women (rural areas in particular) with regard to their rights should be alleviated also by the efforts of Gender NGOs and UN Aid programs. In addition, there is a concern regarding whether the application of this right might hinder women from pursuing their career, if their effort in the household become monetized, as some husbands might deny women free access to labor market seeing no point of her pursuing her career. Awareness of the society is the responsibility of the feminist advocate group to pressure the state as occurred in Morocco, the religious clergy, to familiarize the society with its jurisprudential soundness, as occurred in Indonesia. Religious clergy represented in Egypt by al-Azhar members, are encouraged to promote egalitarian interpretation of the Quranic text and Islamic jurisprudence. Additionally, civil society rights advocates, media personnel's and sociologists who must draw the attention of the Egyptian society to the mega role that

Egyptian wives are performing to elevate the livelihood of the family which may be the responsibility primarily of the Egyptian Ministry of Education through their teachers and curriculum should promote and grass root in children's mind that women should not be adversely affected by marriage and that justice entails that any labor exerted to be financially compensated as indicated in the Qur'anic text.

Finally, justice, which is a one of the Islamic jurisprudence *maqasid* (missions/ purposes), entails that any labor exerted is to be financially compensated in a just manner. Denying women their share of the matrimonial wealth which they worked for its development means not acknowledging them as equal economic partners in the marriage institution.

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